UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	Case No. 17-cv-6260
	)	
CITY OF CHICAGO,	)	
	)	
Defendant.	)	

Comments of the Fraternal Order of Police Chicago Lodge No. 7 to Proposed Consent Decree

Fraternal Order of Police Chicago Lodge No. 7 (hereinafter the "Lodge") submits the following comments on the proposed consent decree filed by the office of the Attorney General of Illinois (hereinafter the "OAG") and the City of Chicago (hereinafter the 'City") pursuant to this Court's Order Setting Public Fairness Hearing and Written Comment Period on Proposed Consent Decree issued on Sept. 19, 2018. [Doc. 114].

I. Introduction

On August 29, 2017, the State of Illinois ("State") filed this action against the City pursuant to 42 U.S.C. § 1983, the U.S. Constitution (Fourth Amendment), the Illinois Constitution (Article I, Section 6), the Illinois Civil Rights Act of 2003 (740 ILCS 23/5(a) and (b)), and the Illinois Human Rights Act (775 ILCS 5/5-102(C)) for the purpose of requiring that the City enact comprehensive lasting reform of the Chicago Police Department, the Independent Police Review Authority, and the Chicago Police Board. [Doc. 1].

The Lodge filed a motion to intervene and a motion to dismiss pursuant to Federal Rule of Civil Procedure Rule 24, and this court has denied the motion to intervene. [Doc. 88] The motion to dismiss was directed only to the allegations under 42 U.S.C. Section 1983 that asserted

claims under the Fourth Amendment to the U.S. Constitution. This court did not rule on the motion to dismiss.

On September 13, 2018, the OAG and the City filed a proposed consent decree that contains 799 paragraphs and 226 pages covering the subjects of community policing, impartial policing, crisis intervention, use of force, recruitment, hiring and promotion, training, supervision, officer wellness and support, accountability and transparency (including disciplinary matters and investigations), data collection and analysis, implement, enforcement and monitoring of the consent decree. [Doc. 107-1]. A number of these provisions provide substantial benefits to the interests of police officers and the public, such as community policing, training, mental health support and counseling and crisis intervention, but there are a number that directly conflict with the negotiated provisions of the Lodge's collective bargaining agreement, statutes and ordinances that protect police officers and their statutory rights to engage in collective bargaining on changes in the policies of the Chicago Police Department that involve wages, hours, and conditions of employment and which impact them, e.g. investigations of officers and related discipline of them.

The Lodge had not accepted or consented to the implementation of the provisions which conflict with the collective bargaining agreement or any statutory rights guaranteed to it or its members. There has also been no evidence presented by the OAG in an adversarial hearing to support the dramatic changes that it seeks in the collective bargaining agreement and officers' work place rights guaranteed under statutes and ordinances. Without the consent of the Lodge or a finding by the court of a constitutional wrong, the consent decree provisions affecting the CBA and officers' statutory rights would be improper. There will not be a presentation of wrong doing due to the non-admission clause providing that neither the City nor the Chicago Police

Department has engaged in any unconstitutional, illegal or otherwise improper activities or conduct. The non-admission clause further states that the City's entry into this agreement is not an admission of any finding or conclusions contained in the 2016 report of the U.S. Department of Justice on the Chicago Police Department. Paragraph 701. [Doc. 107.1 at 210]. In addition paragraph Number 707 further provides that the consent decree is not and will not be construed as an admission of liability to support a claim against the City and its agents under Section 1983 alleging violations of the U.S. Constitution, the Illinois Constitution, the Illinois Civil Rights Act and the Illinois Human Rights Act. *Id.* at 212.

A. The Consent Decree Cannot Negate the CBA or Statute

The Lodge is recognized by the City of Chicago as the sole and exclusive representative for a bargaining unit of all sworn police officers below the rank of Sergeant and pursuant to the provisions of the IPLRA (5 ILCS 315/1, et seq.) has had an enduring collective bargaining relationship with the City of Chicago to negotiate wages, hours and working conditions on behalf of the bargaining unit.

Under the provisions Section 7 of the IPLRA, the Lodge has the right to bargain collectively and negotiate in good faith with the City of Chicago with respect to wages, hours and other conditions of employment, to bargain about matters that may be covered by other laws that pertain in part to a matter affecting wages, hours and other conditions of employment, and to enter into collective bargaining agreements containing causes which either supplement, implement or relate to the effect of such provisions in other laws. 5 ILCS 315/5 and 7. To that end, the City of Chicago and the Lodge have negotiated numerous collective bargaining agreements since approximately 1980. The most recent collective bargaining agreement has a term of July 1, 2012, to June 30, 2017, and pursuant to Section 28.2 of the collective bargaining

agreement, all of its provisions remain in full force and effect after the expiration date while negotiations or an impasse resolution procedure are continuing for the renewal of the collective bargaining agreement. Collective Bargaining Agreement between the City of Chicago and Fraternal Order of Police Chicago Lodge No. 7, ("CBA") Section 28.2. [Doc. 51-3 at 56]. Because these contract rights have been negotiated based upon the state's major collective bargaining law and are to be impacted by the OAG's requested injunctive relief in the complaint it filed, the Lodge filed a motion to intervene in this case to have a protectable interest in the remedy in this case. *See, People Who Care v. Rockford Bd. of Ed.*, 961 F.2d 1335, 1338 (7th Cir. 1992). *See also*, *U.S. v. City of Los Angeles*, 288 F.3d 391, 400-01 (9th Cir. 2002).

The CBA contains provisions addressing a number of the subjects raised in the OAG's complaint. They include the investigation of allegations of police officer misconduct and related discipline, the field training officer program, police officer promotions, officer mental health and support programs, including the performance recognition system, behavioral intervention system, personal concerns program, the requirement that allegations of misconduct by police officers be supported by affidavits, and other issues that were negotiated to protect the work related rights of the police officers. The Seventh Circuit has held that contract provisions negotiated between employers and labor organizations may not be changed by a consent decree without the assent of the union. *People Who Care*, 961 F.2d at 1337 (7th Cir. 1992), *citing*, *W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 771 (1983).

The Seventh Circuit also held in *People Who Care* that litigants may not agree to disregard valid state laws. 961 F.2d at 1337. As a result of the union's intervention, the court concluded that it was inappropriate for the district court in a consent decree to override collective bargaining contract provisions or to relieve the school district of its statutory obligation to

bargain with the union about contract modifications. 961 F.2d at 1339. This court decision is a significant statement by the Seventh Circuit on the need to preserve the rights of employee arising under collective bargaining agreements and statutes. The union intervened in that case to complain that a significant contract provision negotiated by the union and the employer was being impaired by the consent decree that had been negotiated between the plaintiff community group and the Rockford Board of Education. *Accord, Doe v. Cook County,* 798 F.3d 558, 563-4 (7th Cir. 2015).

To protect the interests of police officers under the collective bargaining agreement and their statutory rights, representatives of the Lodge met with the OAG. On or about September 18, 2017, representatives of the Lodge met with representatives of the OAG. The Lodge President, Kevin Graham, stated the Lodge's position that the consent decree should not have an effect on the collective bargaining process or key provisions of the collective bargaining agreement, including the provision that requires signed affidavits to be obtained in connection with the investigation of a police officer. He indicated the need for assurances that a complaint against the officer be legitimate and that an affidavit is an essential way in doing this. This affidavit process had been agreed upon by the Lodge and the City of Chicago and placed in the collective bargaining agreement years ago. In essence, the Lodge wanted to avoid false complaints and misidentified police officers. He also indicated that he understood that the new head of the Civilian Office of Police Accountability ("COPA"), had made a public statement of a desire to obtain a ten percent conviction rate in all police officer investigations cases. [Doc. 81-4 at 1].

He also opposed any adverse changes in the collective bargaining agreement resulting from the consent decree. The Lodge was assured by representatives of the OAG that there were many things in both parties' interests that the OAG would be as cooperative as it could be and

that the OAG wanted an open exchange of information. The OAG representatives stated that they were here to help the officers and not hurt them. In conversations with the Lodge, the OAG indicated a willingness to protect the interests of the officers' collective bargaining agreement in an attempt to persuade the Lodge not to intervene in this case. Mr. Graham indicated on behalf of the Lodge its desire to use a consent decree as a vehicle by which the police department operations would be improved and that citizens would be made safer. The Lodge was advised by the OAG that its representatives were anxious to hear the perspective of the Lodge with respect to problems within the police department.

Accordingly, the Lodge presented to the OAG a list of "Issues For Discussion," which includes provisions, *inter alia,* to protect the collective bargaining agreement from being overridden by the consent decree, the dire understaffing of the police department, the great need for enhanced and improved training, serious problems with the promotion system, unilateral decision making by the Department on various policies that affect the wages, hours, and working conditions of officers, including but not limited to body worn cameras, video release policy, and disciplinary guidelines. The Lodge also expressed concerns about safety and equipment malfunctions, the field training officer program, the use of non-certified investigators by the COPA in the investigation of officer involved shootings and the violation of State law in that regard, and other matters. Unfortunately, the concerns of the Lodge addressed in meetings with the OAG have not been resolved. A review of the hundreds of paragraphs in the consent decree supports this claim, and the concerns of the Lodge are stated below.

One of the biggest disappointments with the draft consent decree is its failure to attempt to resolve one of the major public safety problems in the city and that is the understaffing of the police department that leads to inadequate coverage of the beats in high crime areas and the

inability of officers to obtain time off and use their accumulated and available compensatory time for unexpected family and personal needs. Over the summer and the past weekend, days off have been cancelled for police officers and this is added stress to their personal and professional lives. This is a result of the serious understaffing of the CPD. There is nothing in the consent decree that deals with that problem and unless there is, the public safety of citizens will continue to be in jeopardy. The list of these discussion points is included in the record before this court as part of the Lodge's Reply Brief and is attached to these comments as Appendix A. [Doc.81-3].

B. Carve Out Language of the Consent Decree Does Not Protect Officers' Rights Under Illinois Law and the Chicago Municipal Code

The OAG has proposed that the consent decree contain provisions that would give the collective bargaining agreement predominance over conflicts with the decree and to do the same with the Illinois Public Labor Relations Act, 5 ILCS 315/1 et seq. ("IPLRA"). However, the carve-out language in paragraphs 710 and 711 refers only to conflicts under the collective bargaining agreements and with collective bargaining rights of employees under the IPLRA. Paragraph 710 acknowledges that the Lodge has certain rights and obligations under the IPLRA. [Doc. 107-1 at 213. There is no reference in this carve out language to other states statutes and the Chicago Municipal Code. Para. 711 states that the consent decree is not intended to impair or conflict with the collective bargaining rights of employees under the IPLRA. *Id.* at 214. There is substantial prejudice to the interests of the Lodge and the police officers it represents due to provisions in the consent decree that directly conflict with or contradict Illinois law and the Chicago Municipal Code: *Uniform Peace Police Officers Disciplinary Act*, 50 ILCS 725/3.8 (b), *Police and Community Relations Improvement Act*, 50 ILCS 727/1-1, *Law Enforcement Officers-Worn Camera Act*, 50 ILCS 706, and *Chicago Municipal Code*, Chapter 2-84, *Department of Police Article IV-Sworn Member Bill of Rights*. These statutory and municipal code provisions

stand apart from the labor relations protections in the IPLRA, and the proposed consent decree directly conflicts with them. The narrow language of the carve-out provision does not protect the rights contained in these provisions.

1. Sworn affidavits

Consent Decree Paragraphs 425, 427, 431 and 462 conflict with the affidavit requirement of the *Uniform Peace Officers' Disciplinary Act*, 50 ILCS 725/3.8 (b), which provides:

> (b) Anyone filing a complaint against a sworn peace officer must have the complaint supported by a sworn affidavit. Any complaint, having been supported by a sworn affidavit, and having been found, in total or in part, to contain knowingly false material information, shall be presented to the appropriate State's Attorney for a determination of prosecutions.

The Illinois Public Labor Relations Act also provides that "[n]othing in this Act shall be construed to replace the necessity of complaints against sworn a peace officer … from having a complaint supported by a sworn affidavit." 5 ILCS 315/15(a). Directly contrary to these statutes, paragraph 462 specifically states: "A signed complainant affidavit will not be required to conduct a preliminary investigation." [Doc. 107-1 at 132]. At paragraph 425, the consent decree also allows complaints against police officers to be submitted by a telephone using a 24 hour service leaving a voicemail message. *Id.* at 126. Clearly, the intent of the consent decree is to allow oral complaints that are not to be supported by a sworn affidavit. Paragraph 427 requires the City and the CPD accept all complaints whether submitted "verbally or in writing: in person, by telephone, online or by a complainant anonymously or by a third-party representative" and are to be investigated in "accordance with this Agreement and the applicable collective bargaining agreement." *Id.* at 128. The consent decree, in paragraph 431 makes abundantly clear that it will not abide by statutory requirements, as it requires the CPD to ensure that the

absence of a signed complainant affidavit will not preclude an administrative investigation. *Id.* at 129.

The last sentence of the *Uniform Peace Officers' Disciplinary Act*, 50 ILCS 725/3.8(b) indicates the importance of protecting police officers from having to respond to false accusations against them. The statute provides that complaints made against officers "having been found, in total or in part, to contain knowingly false material information, shall be presented to the appropriate State's Attorney for a determination of prosecution." *Id.* The consent decree does not provide for referral of false statements to the State's Attorney, despite this being a statutory requirement. This is an important issue given the consent decree's open invitation to allow any kind of unverifiable complaint to be initiated at the veritable "drop of a dime."

2. Anonymous Complaints

The consent decree provisions that allow an anonymous complaint to be submitted by telephone or voice mail also runs counter to the statute requiring signed affidavits and the Chicago Municipal Code provision that prohibits the use of anonymous complaints. Section 2-84-330 (D) of the Code provides: "No anonymous complaint made against an officer shall be made the subject of a complaint register investigation unless the allegation is of a criminal nature." Consent decree paragraphs 425, 427, 429, 440(b), 461, and 478 allow individuals to file anonymous complaints against police officers and require the CPD to accept and investigate them. Under paragraph 429, the City is to ensure that a website is made available for the use of anonymous complaints by CPD members to report officer misconduct. *Id.* at 128.

Paragraph 440(b) requires that such website submitted complaints will be sent to COPA for processing, [Doc. 107 at 131], and paragraph 461 requires anonymous complaints alleging misconduct are to be preliminary investigated. *Id.* at 138-9. According to paragraph 478, within

120 days of the effective date of the consent decree, the CPD and COPA are to revise their policies to include the preliminary investigation of anonymous complaints. *Id.* at 146. Paragraphs 425 provides that the CPD and COPA will "…ensure individuals are allowed to submit complaints in multiple ways…, including … anonymously." *Id.* at 126. Paragraph 427 is a conflict by stating that the City and the CPD "will ensure all complaints" including anonymous complaints are accepted and investigated. *Id.* at 128. These consent decree paragraphs require the CPD and COPA to use anonymous complaints in the investigation of police officers, and, therefore, are in violation of the Chicago Municipal Code.

3. Investigation of officer-involved shootings

Consent Decree paragraphs 488-92 do not require a state certified homicide investigator to investigate officer-involved shootings and deaths, as is required by state law. The *Police and Community Relations Improvement Act* (PCRIA), has several requirements for investigators of officer-involved shootings. 50 ILCS 727/1-1. The consent decree fails to incorporate or address these statutory requirements.

PCRIA requires that the lead investigator is to be certified as a Lead Homicide Investigator by the Illinois Law Enforcement Training Standards Board or the Department of State Police or similar training provided by Illinois Law Enforcement Training Standards Board certified schools. *Id.* It states, *inter alia*

> Each officer-involved death investigation shall be conducted by at least 2 investigators,…one of whom is the lead investigator," who shall be a person certified by the Illinois Law Enforcement Training Standards Board as a Lead Homicide Investigator…. 50 ILCS 727/1-10 (b).

The consent decree provides for a COPA investigator to participate in the preliminary assessment and investigation of officer-involved shootings and deaths, but there is no requirement that this investigator meet the statutory requirements. On information and belief, the

Lodge is aware that the Illinois Law Enforcement Training Standards Board and the OAG have failed to ensure the CPD's and COPA's compliance with this statutory requirement. The only reference to this Act in the consent decree is in paragraph 492 which states that the investigations will comply with the Act for "… [c]riminal investigations into the actions of any CPD member relating to an officer-involved death," and use its best efforts to ensure that a law enforcement agency as defined in the PCRIA will conduct such investigations. [Doc. 107-1 at 151]. The CPD should not be investigating such serious matters in violation of the statute. The Lodge has requested the OAG to take an active role in the enforcement of this statute and to ensure lawful investigations in this area. The Lodge is still waiting for a response.

Three problems are clear from this statement: 1) the consent decree applies the standard to only criminal matters, and the PCRIA has no such limitation as investigations could involve a shooting that does not have a criminal element; 2) the PCRIA requires that the investigation be performed by a certified investigator; and 3) that a law enforcement agency may not conduct such an investigation without a certified investigator. 50 ILCS 727/1-5. The consent decree cannot avoid this requirement. It does not meet the statutory standard and, therefore, does not comply with the state law.

4. Complainants are to be identified to officers under investigation

The Chicago Municipal Code in Chapter 2-84, Department of Police, Article IV – Sworn Member Bill of Rights provides protection for police officers during the investigation of allegations filed against them, and the consent decree is inconsistent with these important provisions. Paragraph 475 provides that the CPD will undertake best efforts to ensure that the identities of complainants are not revealed to the involved CPD member prior to the CPD member's interrogation. [Doc. 107-1 at 146]. This provision conflicts with the Code Section 2-

84-330, which provides: "Immediately prior to the interrogation of an officer under investigation, he shall be informed in writing of the nature of the complaint and the names of all complainants."

5. Random audits of videos

The consent decree further violates state statute in addressing the issue of body worn camera footage review. Illinois state statute directly addresses aspects of the body worn camera provisions of the consent decree, and the consent decree is not in compliance with those statutory provisions.

Consent decree paragraphs 238(g) and 576 require random audits of body worn cameras. Paragraph 238(g) states the CPD's body worn camera policy "will require random review of officers' videos for compliance with CPD policy and training purposes." [Doc. 107-1 at 75]. Paragraph 576 provides:

> CPD will conduct random audits of body-worn and in-car camera recording of incidents that involved civilian interactions to assess whether CPD officers are complying with CPD policy. CPD will take corrective action to address identified instances where CPD officers have not complied with CPD policy as permitted by law…. *Id.* at 182.

This is not consistent with the time and destruction requirements under Illinois statute.

The *Law Enforcement Officer-Warn Body Camera Act*, 50 ILCS 706, which provides that a video recording shall be destroyed after a 90-day storage period, unless the encounter captured on the recording has been flagged as provided in the Act. The Act states:

> (7) Recordings made on officer-worn cameras must be retained by the law enforcement agency or by the camera vendor used by the agency, on a recording medium for a period of 90 days.

(A) Under no circumstances shall any recording made with an officer-worn body camera be altered, erased, or destroyed prior to the expiration of the 90-day storage period.

(B) Following the 90-day storage period, any and all recordings made with an officer-worn body camera must be destroyed, unless any encounter captured on the recording has been flagged. An encounter is deemed to be flagged when:

(i) a formal or informal complaint has been filed;
(ii) the officer discharged his or her firearm or used force during the encounter;
(iii) death or great bodily harm occurred to any person in the recording;
(iv) the encounter resulted in a detention or an arrest, excluding traffic stops which resulted in only a minor traffic offense or business offense;
(v) the officer is the subject of an internal investigation or otherwise being investigated for possible misconduct;
(vi) the supervisor of the officer, prosecutor, defendant, or court determines that the encounter has evidentiary value in a criminal prosecution; or
(vii) the recording officer requests that the video be flagged for official purposes related to his or her official duties.

50 ILCS 706/10-20(a)(7).

Random audits after the 90-day period would violate the statute because they are to be destroyed after that date, and the consent decree does not provide for such protection.

In connection with these random audits, consent decree paragraph 576 further provides that "corrective action," meaning discipline, will be taken by the CPD to "address identified instances where CPD officers have not complied with CPD policy as permitted by law." [Doc. 107-1 at 182]. Paragraph 238(i) on body-worn cameras requires the CPD to "…specify that officers who knowingly fail to comply with the policy [regarding body-worn cameras] may be subject to progressive discipline, training, or other remedial action." *Id.* at 76. It is clear that the disciplinary actions contemplated by para. 238 and particularly subsection (i) include alleged violations of the policy of the CPD "regarding body-worn camera video and audio recording.

Elements of that required policy include the circumstances under officers are required to use the body-worn cameras, requiring officers to activate their cameras when responding to calls for service, articulating in writing reasons for failing to record an activity, and requiring officers to inform subjects that they are being recorded. Para. 238 (a.) to (d.).

Under this subsection (i) of paragraph 238, officers would be subject to discipline for failing to comply with the policy as stated above, but this provides for a broader range of reasons for discipline than the discipline than the misconduct that is specified in Section 10-20 (9) of the *Law Enforcement Officer-Body Worn Camera Act.* The statute limits the use of video recordings for discipline purposes to the following circumstance and not for mere violations of a CPD policy, i.e., failing to inform a subject that he or she is being recorded:

> (9) Recordings shall not be used to discipline law enforcement officers unless:
>
> (A) a formal or informal complaint of misconduct has been made;
> (B) a use of force incident has occurred;
> (C) the encounter on the recording could result in a formal investigation under the Uniform Peace Officers' Disciplinary Act; or
> (D) as corroboration of other evidence of misconduct.
>
> Nothing in this paragraph (9) shall be construed to limit or prohibit a law enforcement officer from being subject to an action that does not amount to discipline.
>
> 50 ILCS 706/10-20(9).

It is clear that the two consent decree paragraphs on body worn camera video do not protect police officers from a review of the videos in situations where there has been no complaint, no use of force, no encounter that could result in a formal investigation, or no need for corroboration of misconduct evidence, despite statute providing for such protections. The consent decree would allow the review of videos and discipline of officers for compliance with CPD policy for quality control as to how the officers perform their jobs, which is not one of the

categories allowed under statute. The purpose of the *Law Enforcement Officer-Body Worn Camera Ac* is to collect evidence and documentation to settle disputes and allegations of misconduct. 50 ILCS 706/10-5. The General Assembly did not enact this law to allow law enforcement agencies to use the cameras as random, management evaluation tools of officers' job performance.

The use of random audits after the protected 90-day period would be in violation of the Act because the recordings are to be destroyed and review for random quality control purposes is not permitted under statute. Therefore, the Consent Decree is not in compliance with Illinois state statute.

6. Firearms Owner's Identification Card

The CPD asserts that a Firearms Owner's Identification Card (FOID) is a condition of employment, but there is a statutory right dealing with this issue that has not been recognized by the consent decree. Paragraph 387 of the consent decree provides that the CPD will develop a roll call training to explain and address the effects of FOID card eligibility on an officer who receives CPD support services, including counseling and mental health treatment. [Doc. 107-1 at 236]. This deals with the FOID card issue for officers in the Wellness Program or one of the officer watch programs used by the CPD to serve the mental health needs of officers.

The practice of the CPD has been to place the officer who is released from such mental health treatment in a hold or non-pay status while attempts are made to reinstate the officer's FOID card. Upon release from such treatment, the officer has a significant time delay and legal expense in attempting to reinstate the FOID card. Officers in such a situation are to be in non-pay status, which creates a significant economic hardship. With the CPD position that a FOID card is a condition of employment, an officer with a realistic fear of losing the FOID card might decide

not to seek mental health treatment. There is no reference to the Lodge having a role in dealing with the FOID issue for such officers, and this is a significant issue involving the CPD's requirement of a FOID card as a condition of employment.

However, the CPD may not under the *Peace Officers' Disciplinary Act* require the possession of a FOID card to be a condition of employment. 50 ILCS 725/7.2

> Possession of a Firearm Owner's Identification Card. An employer of an officer shall not make possession of a Firearm Owner's Identification Card a condition of continued employment if the officer's Firearm Owner's Identification Card is revoked or seized because the officer has been a patient of a mental health facility and the officer has not been determined to pose a clear and present danger to himself, herself, or others as determined by a physician, clinical psychologist, or qualified examiner. *Id.*

Accordingly, the consent decree should be modified to protect against the loss of a FOID card for those officers experiencing mental health stress and seeking treatment as an inpatient or outpatient. The consent decree does not recognize the officers' statutory rights.

7. Union-Agent Privilege

Consent decree paragraph 465(a) requires a police officer in an administrative interview to reveal the identity of persons with whom he or she has communicated regarding the incident in question and the content of such communication. [Doc. 107-1 at 141]. The reference to evidentiary privilege under Illinois law in this paragraph does not refer to the Illinois union-agent privilege. 735 ILCS 5/803.5. The union-agent privilege is important to the interests of the Lodge and the officers. An officer's communication with Lodge representatives is protected from inquiry by this privilege, and it should be specifically recognized by the consent decree.

8. Disciplinary records

The State's *Personnel Record Review Act*, 820 ILCS 40 /8 requires an employer to delete disciplinary records that are more than four years old. It provides:

> An employer shall review a personnel record before releasing information to a third party and, except when the release is ordered to a party in a legal action or arbitration, delete disciplinary records, letters of reprimand, or other records of disciplinary action which are more than 4 years old. *Id.*

The consent decree does not mention this prohibition in its requirement that records that are more than four years old should be deleted. Paragraph 495. [Doc. 107-1 at 236-7].

The consent decree should be amended to reflect the rights that officers have under this statute.

Any claim by the OAG or the City that it will attempt to use the collective bargaining process to insert a contract provision that would prohibit the submission of such information to a police officer should be rejected because such an attempt would be a permissive subject of bargain that may not be forced upon the Lodge. The Illinois Appellate Court recently held that a public employer may not seek to present to an interest arbitrator an issue for resolution that would diminish statutory rights of fire fighters under the Firefighters Promotion Act. *Skokie Firefighters Union Local 3033 v. Illinois Labor Relations Board*, 2016 Ill. App. (1st) 152478, 74 N.E. 3d 1023, 1029 (2016). Similarly, the OAG and City cannot use the consent decree as a vehicle to change the existing law that protects the rights of police officers. This same argument applies to all of the statutory or municipal code rights which the police officers have.

9. The Carve-Out Language is not Sufficiently Protective

Consent Decree paragraph 710 is the first of the two carve-out provisions, and it is simply an acknowledgment of the existence of the City's CBAs and its general obligations under the IPLRA. [Doc. 107-1 at 220]. It imposes no obligation to protect the Lodge's contractual rights under its collective bargaining agreement ("CBA") with the City or its statutory rights under the IPLRA.

Similarly, Paragraph 711 fails to adequately address the effect of the consent decree on both the Lodge's contractual and statutory rights under the IPLRA. *Id.* at 221. The first sentence of Paragraph 711 is merely a statement of intent. It provides that "[n]othing in this Consent Decree is intended to (a) alter any of the CBAs between the City and the Unions; or (b) impair or conflict with the collective bargaining rights of employees in those units under the IPLRA." *Id.* While the parties may not intend to change existing contract rights or impair statutory bargaining rights, this provision fails to square with the several provisions of the consent decree described below that already impair the Lodge's contractual and statutory rights. Its makes little sense to knowingly impair such rights and then claim that the parties never intended to do so. This statement of intent falls far short of offering the Lodge and its members a clear assurance that their rights under the CBA and the IPLRA will not be disturbed.

The second sentence of Paragraph 711 suffers from similar deficiencies. It provides as follows:

> Nothing in this Consent Decree shall be interpreted as obligating the City or the Unions to violate (i) the terms of the CBAs, including any Successor CBAs resulting from the negotiation process (including Statutory Impasse Resolution Procedures) mandated by the IPLRA with respect to the subject of wages, hours and terms and conditions of employment unless such terms violate the U.S. Constitution, Illinois law or public policy, or (ii) any bargaining obligations under the IPLRA, and/or waive any rights or obligations thereunder. *Id.*

There are three primary problems with this provision. First, the plain language of this provision asserts that nothing in the consent decree "shall be interpreted as obligating the City…to violate" the CBA or any bargaining obligations under the IPLRA. *Id.* This is wholly different from a "shall not conflict with" prohibition for the City and the OAG to impinge upon the CBA or the IPLRA. Asserting that there is nothing in the consent decree that shall be interpreted as requiring a party to violate the CBA or the IPLRA is materially different from implementing a

clear prohibition against the use of the consent decree to violate the CBA or bargaining obligations under the IPLRA. This provision does not offer the Lodge adequate protection of its statutory or contractual rights. Further, this does not bar the parties from inserting provisions into the consent decree which directly conflict with the collective bargaining agreement, successor agreements, or the IPLRA. The carve-out language in the consent decree does not contain all of the provisions that had been negotiated and discussed between the parties.

Paragraph 711 only states that the consent decree shall not be interpreted as obligating the City to violate the terms of the CBAs, "unless such [CBA] terms violate the U.S. Constitution, Illinois law or public policy." *Id.* This language implies that if a provision of the CBA violates Illinois law or public policy, then not only does the consent decree *allow* the City to violate that contract language, but it *obligates* the City to violate that contract language.

To the extent the consent decree itself is considered Illinois law and/or public policy, then under its own terms it would prevail over any conflicting language in the CBA. For example, a provision of the CBA prohibits the use of anonymous complaints against officers. The consent decree, on the other hand, requires the City to accept and investigate all anonymous complaints. This could be considered a statement of public policy that the City should accept all anonymous complaints and use them in officer investigations. In that case, the CBA language prohibiting the use of anonymous complaints violates this stated public policy. Thus, the City would be allowed to violate that CBA language in favor of the public policy stated in the consent decree. Indeed, the consent decree's language suggests that in this situation, the City would be obligated to violate this CBA term.

This highlights a second deficiency of this provision which lies in the fact that it is inconsistent with the requirements of Section 15 of the IPLRA, 5 ILCS 315/15. Section 15(a) of the IPLRA provides, in relevant part, as follows:

> In case of any conflict between the provisions of this Act and any other law…, executive order or administrative regulation relating to wages, hours and conditions of employment and employment relations, the provisions of this Act or any collective bargaining agreement negotiated thereunder shall prevail and control.

Continuing further, Section 15 states as follows:

> [A]ny collective bargaining contract between a public employer and a labor organization executed pursuant to this Act shall supersede any contrary statutes, charters, ordinances, rules or regulations relating to wages, hours and conditions of employment and employment relations adopted by the public employer or its agents.
>
> 5 ILCS 315/15(b).

Thus, under Section 15, the law of the State of Illinois is that the IPLRA and any CBAs negotiated under that statute will prevail and control in the event of a conflict with any other law, executive order, or administrative regulation that relates to wages, hours and conditions of employment and employment relations. *Id.* Given that IPLRA and CBA rights predominate in the event of a conflict with any other law adopted by the General Assembly, Section 15 would plainly apply in the instant matter as it concerns a conflict with the terms of a consent decree, which is simply a settlement agreement that is subject to continued judicial policing. *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1017 (6th Cir. 1994).

The second sentence of Paragraph 711 states that nothing in the consent decree shall be interpreted as obligating the City to violate the terms of the CBA or the bargaining obligations of the IPLRA "unless such terms violate…Illinois law or public policy". [Doc. 107-1 at 214]. This limitation is inconsistent with the law of this State and its policy, which, as explained above, is

set forth in Section 15 of the IPLRA. It is the law and policy of the State to ensure that if there is a conflict between either the provisions of the IPLRA or "any collective bargaining agreement negotiated thereunder," and any other law, the provisions of the IPLRA or CBA "shall prevail and control." *See* 5 ILCS 315/15. Paragraph 711's phrase "unless such terms violate…Illinois law or public policy" does not account for this. If a term is in a CBA, and that CBA was negotiated under the IPLRA, as are all of the Lodge's agreements with the City, Section 15 of the IPLRA requires that that term "prevail and control" even if it is inconsistent with Illinois law. The consent decree does not protect the Lodge's rights and does not account for the predominance of IPLRA and CBA rights under Illinois law.

In Section II below, the Lodge has detailed several instances in which the terms of the draft consent decree directly violate existing contract rights and foreclose bargaining over mandatory subjects of bargaining. By requiring such terms, the State has effectively inserted itself as a third party to the CBA. By agreeing to such terms, the City has effectively closed its eyes to the requirements of its contract with the Lodge and its duties under the IPLRA. It is entirely inconsistent and inappropriate to draft provisions of a consent decree that plainly violate the terms of a CBA and close the door to required bargaining, and then claim that no portion of the consent decree should be construed to require as much. The very last sentence of Paragraph 711, which requires the City to use its best efforts to modify its CBAs to bring them in line with the terms of the consent decree, should be read as an open acknowledgement by the parties that this consent decree impacts contract rights and bargaining obligations under the IPLRA. [Doc. 107-1 at 221]. As drafted, this consent decree poses significant limitations on the Lodge's existing contract rights and its bargaining rights and does not define the term best efforts as a

requirement that the City bargain with the Lodge in good faith as that term is defined in Section 7 of the IPLRA. Para. 729, *Id.* at 225; 5 ILCS 315/7.

II. OAG Consent Provisions Interfere with Lodge 7 Contract Rights and Collective Bargaining Rights under the Illinois Public Labor Relations Act & Other Statutorily Guaranteed Rights

The consent decree impacts upon the collective bargaining agreement and the negotiated rights and benefits contained therein, rights to bargain over certain mandatory subjects of bargaining as provided for the IPLRA, as well as matters outside the IPLRA but provided for and protected by other statutes. This section of the comment notes those conflicts and contradictions and advocates that the court not use the consent decree is a take-away vehicle. To minimize the amount of post decree litigation, the Lodge suggests that the court revise the consent decree in a manner that is respectful of the contract rights, those rights that arise under the IPLRA, and those rights protected by other statutes.

A. Matters that violate the CBA

The sections of the proposed consent decree covered in this section are issues that are in violation of the City of Chicago Police Department and Lodge 7's collective bargaining agreement. As such, the following sections of the consent decree should not be approved by the court as they violate the contractually protected rights of the police officers covered by the CBA.

1. Photography of officers by the public - Paragraph 58 requires that within 90 days of the consent decree's effective date, the CPD develop a policy that will require police officers to permit members of the public to photograph and record the officers in the performance of their duties in a public place. [Doc. 107-1 at 24]. The Lodge believes that this is a very dangerous proposal that will expose officers and their families to potential intimidation and harassment from citizens, who will be able to learn their identities and then advocate for actions to be taken

against them. It is inconsistent with the intent of the City and the Lodge to protect the images of the officers, as stated in Section 6.4 of the CBA, which bars the publication of a photo of an officer under investigation prior to conviction or a decision by the Police Board, or where required by law. [Doc. 51-3 at 15].

The Lodge has made several complaints to the City of Chicago Inspector General about violations of the contract concerning the release of images of police officers. To date, there has been no response.

An officer should be allowed to request citizens not to photograph their actions in sensitive or covert operations. The integrity of such actions by the police would be undermined by citizens recording information of officers engaging in undercover operations. There is no protection for the officers in this paragraph for those situations in which the officers' operations could be imperiled by citizens coming close to the operation and potentially interfering with the officers. Suppose an officer is walking through dark alley looking for an offender and a citizen illuminates the officer with a camera flash in order to take photograph. At that point the officer's presence would be clearly disclosed, and the success of the operation would be at risk. This is a situation that endangers the officers and the mission of the CPD. There is a serious problem with this proposal.

2. Promotions - In paragraphs 249 – 264, there is no reference to the CBA requirement that seniority shall be considered in the promotion of officers, and that seniority in competitive testing shall be utilized as a tie-breaker. Section 23.3 CBA, [Doc. 51-3 at 44]; [Doc. 107-1 at 79-83]. Paragraphs 261-64 do not deal with the promotion to the position of detective. *Id.* at 81-2.

3. Field training and evaluations of FTOs - Paras. 298-308. *Id.* at 92-4. Para. 302 states the criteria for selecting the Field Training Officers will continue to be reviewed and will be subject to the CBA, but there is no reference to specific contract sections to be used, and no reference to bargaining with the Lodge over the criteria to be used in the absence of any contract section dealing with the selection issue, especially the use of seniority in selection and promotion of police officers, as required by the promotion section of the CBA-Section 23.3. [DOC. 51-3 at 44].

The breach of the CBA in this section is that disciplinary histories are to be used, and the CBA at Section 8.4 has a limitation on such use in that discipline files are to be destroyed five years after the date of the incident or the date upon which the violation was discovered. [DOC. 51-3 at 18-9]. The use of disciplinary history files is also an issue that is limited by the *Illinois Personnel Record ACT*, 820 ILCS 40/8, *supra*, Section II H, at 15.

4. In-service training. Para. 317- There is no provision that such training is to be conducted while the officers are in pay status. [Doc. 107-1 at 96]. This is a mandatory subject of bargaining for the Lodge and the CPD because it involves compensation and hours of work.

Paragraph 324 further provides that CPD is to determine the sequencing, scheduling and the location of such training. There is no acknowledgment that the Lodge will have the right to bargain with the CPD over these subjects. *Id.* at 98.

Paragraphs 339-340 deal with training on the consent decree itself. The requirement of para. 340 (a) that "all relevant CPD members review their responsibilities pursuant to the policy …and be held accountable for their compliance," is a matter of a discipline standard and such a rule is a subject of bargaining. *Id.* at 103. There is no indication as to the meaning of "relevant CPD members" in Para. 340(a). *Id.* There is no indication that the training on the consent decree

will be done on duty and in pay status. The duty to report alleged violations of the policy is also a subject of bargaining in the context of discipline issues for a failure to report.

5. Unity of Command – Paras. 357-368. *Id.* at 108-11. This is a provision to increase the number of Sergeants to meet the goal of one Sergeant to ten patrol officers, but there is no reference to the substantial need to increase the number of patrol officers, a matter that the Lodge urged to be in the consent decree when its representatives met with the OAG. *See*, *Graham Declaration*, Para M, [Doc. 81-4 at 2]. The unity of command provisions will interfere with the rights of the officers to select their days off and their furloughs, as provided for the contract.

Paragraph 367 contains a requirement to assure the staffing model is met on each watch, but there will be an impact on the assignment of officers' day off groups. [Doc. 107-1 at 111]. A day off group establishes the consecutive days on which the officers do not work, i.e., their weekends, and they are not always on Saturdays and Sundays. This para. establishes a staffing model to achieve a unity of command staffing and a span of control ratio of no more than ten officers to one Sergeant for all field units on each watch in each of the CPD's patrol districts. There is six day off groups on the 4-2 schedule in the patrol division, and police officers may use seniority to select a day-off group assignment, and this is the system under which the officers' consecutive days of work and regular days off are designated. Section 20.10 CBA. [Doc. 51-3 at 40]. This new system will require the officers to change their day off groups in order to be within the same command structure as their Sergeants, especially if the Sergeant has a different day off group. CBA Section 20.10 provides that officers may use their seniority right to select their day-off groups, so any changes that may be required in order to remain with a Sergeant will deprive an officer of his or her day-off group that was selected based on seniority.

Consequently, this will affect the rights of the officers under Section 20.10 to use their seniority to select their day-off groups and the selection of furlough days by seniority under Section 23.2 of the CBA. [DOC. 51-3 at 43].

There is no reference to the Lodge having collective bargaining role on these subjects dealing with day-off-changes and day-off group assignments. This is matter that has to be bargained with the CPD and has serious implications for the assignment of the day off groups, watch selection, furlough and use of seniority. The consent decree seems to provide for a platoon system where the sergeants may have a day-off group that conflicts with that of the police officers and this would affect days on which officers work and furlough selection.

A similar system implemental in the past was not successful. In the TwelfthASDistrict of the CPD several years ago, a pilot program was initiated that is quite similar to the one that is proposed in this consent decree. It was based upon a squad concept in which the officers would report to a single sergeant as their supervisor. A key problem is that program and in the one proposed is that two officers who are partners having different seniority dates might not be able to maintain their partner status based on seniority bids for a job group. It was difficult for the officer –partners to stay together with a single sergeant in the pilot program, and partnership status is a very important concept for work productivity in the CPD. The squad program was terminated by the CPD, and the Lodge did not object. Such a system would disrupt the officer partner-work relationships that have proven to be successful for police work. This single change will impact every patrol officer in a way that violates their time honored and bargained use of seniority to select their days of work, days off and furlough selections.

6. Civilian Oversight of CPD – Para. 422 provides for a community safety oversight board to participate in the accountability of the police department. *Id.* at 125-6. Section 6.5 of the

CBA provides that the Department shall not compel an officer under investigation to speak to or testify before, or to be questioned by any nongovernmental agency relating to any matter or issue under investigation. [DOC. 51-3 at 15]. A community organization may not use the consent decree to violate the provision of the CBA, and the consent decree should be modified to recognize this contract right.

7. Anonymous complaints – Paras. 425, 427, 429, 430, 440(b), and 477. [Doc. 107-1 at 126-29, 131, and 146]. Anonymous complaints are to be considered pursuant to the consent decree. This is inconsistent with the CBA and the statute on this subject, as argued above. Section 6.1 (D) CBA, states: "No anonymous complaint made against an Officer shall be the subject of a Complaint Register investigation unless the allegation is a violation of the Illinois Criminal Code, the criminal code of another state… or a federal statute." [DOC. 51-3 at 12]. There is no recognition of this section in the consent decree. In the misconduct investigation section of the consent decree, there is no reference to the statutory right of the officer have a union representative with him or her at the time of the investigation. See discussion on *Weingarten* rights of employee at Para. 16 at 42-3, *infra*.

8. Sworn affidavit – Para. 431. [Doc. 107-1 at 129]. This paragraph states that the City and the CPD will undertake best efforts to ensure that the absence of signed complainant affidavit will not preclude an administrative investigation and conflicts with Appendix L and Section 6.1(D) of the CBA. However, the CPD does not have a contract or a statutory right to rely upon anonymous complaints pursuant to Section 6.1 (D) of the CBA, unless the allegation is a violation of the Illinois Criminal Code or criminal code of the another state of United States or a federal statute. *Uniform Peace Officers' Disciplinary Act*, 50 ILCS 725/3.8(b). Appendix L, Para. 10 at p. 75, of the CBA provides: "No Officer will be required to answer any allegation of

misconduct unless it is supported by an appropriate affidavit, except as specified in paragraphs one through five above." [DOC. 51-3 at 84]. These consent decree provisions are in direct conflict with Section 6.1 (D) and Appendix L of the CBA and do not recognize or acknowledge these contract provisions. Section 6.1 (D) provides that "no anonymous compliant regarding residency on medical roll abuse shall be subject to … investigation until verified." CBA p. 4. [Doc. 51-3 at 12].

9. Probationary police officer evaluations – Para. 312, [Doc. 107-1 at 94]. The Field Training and Evaluation Review Board is to review the performance of a Probationary Police Officer ("PPO"), but there is a collective bargaining agreement provision that relates to the evaluation process. The PPO's performance will be reviewed by the Field Training and Evaluation Board, which will have the power to recommend separation, re-training by the Academy or additional field training. A request for review by the Board must be made if the PPO is not deemed "field qualified" at the end of any remedial training cycle. The Board will provide referrals and recommendations for action to the Chief of the Bureau of Patrol. However, there is no reference in the consent decree to the rights of a PPO who has completed the first twelve months of the probationary period; such contract rights include the Article 8 employee security right that "no officer shall be suspended, relieved from duty or otherwise disciplined in any manner without just cause." Section 8.1 CBA, p. 10 and Appendix P, p. 82, which is a subject of grievance arbitration, Grv. Nos. 129-15-003 and 129-15-006, currently awaiting a decision from Arbitrator Zimmerman. CBA Section 8.1, [Doc. 51-3 at 10], and CBA Appendix P [Doc. 51-3 at 96]. The consent decree does not provide for such job security rights for probationary police officers.

Under Para. 315, the FTOs are to provide feedback on the program for field training, but there is no reference to the Lodge having a role in this regard. [Doc. 107-1 at 95]. This is a subject of bargaining because it involves the evaluation of the duties and working conditions of the persons (FTOs) providing such training.

10. Interference With Grievance Process – Para. 449 - Notification to the complainant of an officer's filing of a grievance under the CBA is an attempt to interfere with the right of the officer to file a grievance and participate in the grievance-arbitration process, which is not open to the public. [Doc. 107-1 at 135]. The grievance process is limited to the resolution of a dispute or difference between the City and the Lodge concerning interpretation and/or application of the agreement or its provisions. Section 9.1, CBA at 11, [Doc. 51-3 at 19.] A grievance may be initiated by the Lodge or an aggrieved officer and either party may demand arbitration. Section 9.2. [Doc. 51-3 at 20]. There is no provision in the agreement that provides for a member of the public to participate in the process, and the consent decree should be modified to make clear that a complainant in a discipline case may not participate in the processing of the grievance, unless either party seeks to present testimony from the complainant. Otherwise, any attempted participation by the compliant could an interference with the process. Nor is there a provision in the IPLRA that would permit such participation.

11. Disciplinary histories- Para. 456. The City will ensure that disciplinary histories are to be reviewed, but the collective bargaining agreement, Section 8.4, limits the use by the CPD of older disciplinary files in disciplinary actions. Para. 456. [Doc. 107-1 at 137], and CBA Section 8.4. [Doc. 51-3 at 18]. All disciplinary investigation files and records will be destroyed five years after the date of the incident or date upon which the violation is discovered, except that not sustained files alleging criminal conduct or excessive force shall be retained for a period of

seven years. Cases which are identified as "Sustained – Violation Noted, No Disciplinary Action" entered upon a member's disciplinary record or any record of summary punishment may be used for a period not to exceed one year and thereafter may not be used to support or as evidence of adverse employment action. Reprimands and suspensions of one to five days will stay on an officer's disciplinary history for a period of three years from the last date of suspension or date of reprimand or five years from the date of the incident, whichever is earlier. The consent decree violates these contract provisions. See also para. 508 states that the City and CPD will undertake best efforts to ensure that requires that all disciplinary decisions and discipline records will be retained electronically and infinitely, but there is no obligation stated that the efforts to do this will involve collective bargaining negotiations with the Lodge. Para. 508. [Doc. 107-1 at 157].

12. Complainant identity – Para. 475, [Doc. 107-1 at 146]. This paragraph provides that the CPD will undertake its best efforts not to disclose to the police officers under investigation the identities of the complainants prior to the police officer's investigation. This is contrary to Section 6.1 E of the CBA:

> Immediately prior to the interrogation of an Officer under investigation, he or she shall be informed in writing of the nature of the complaint and the names of all complainants. [Doc. 51-3 at 13].

13. Anonymous complaints-Para. 477 [Doc. 107-1 at 146]. This paragraph requires that the CPD accept anonymous complaints and therefore violates the contract provisions baring the use of anonymous complaints, as stated above at Para. 2 at 9-10 and Para. 8 at 27.

14. False statements – Para. 487. [Doc. 107-1 at 149]. The investigators will consider all statements of an officer, including those that have been amended or modified, to determine whether the officer has given a false statement. The collective bargaining agreement prohibits the

Department's investigators from charging the officer with a false statement violation, Rule 14, unless the officer has been given an opportunity to view the video or audio evidence relevant to the matter under investigation. The consent decree does not refer to this contract provision that bars the use of a CPD Rule 14 violation for making false statements. See Section 6.1(M) of the CBA which provides for this right. [Doc. 51-3 at 13].

15. Discipline record of sustained findings – Para. 516 [Doc. 107-1 at 159]. -This paragraph of the consent decree is in direct conflict with Section 8.4 of parties' CBA. The consent provides that "each sustained finding within a CPD member's disciplinary history will be considered for the purpose of recommending discipline for a subsequent sustained finding for a period of up to five years after the date of the incident." *Id.*

This is a direct conflict with Section 8.4 which provides: A finding of "Sustained–Violation Noted, No Disciplinary Action" entered upon a member's disciplinary record or any record of Summary Punishment may be used for a period of time not to exceed one (1) years and shall thereafter be removed from the Officer's disciplinary record and not used to support as evidence of adverse employment action." [Doc. 51-3 at 18].

16. Discipline record given to Police Board – Para. 536, [Doc. 107-1 at 165]. Under this provision, the parties to a Police Board case will be given access to the officer's "complete disciplinary file and will have the opportunity to move for entry into record of proceedings any relevant aspect of the CPD member's disciplinary file, as permitted by law and any applicable collective bargaining agreement." *Id.* Due to the issues raised in these comments above concerning the improper use of disciplinary history, the Lodge believes that this section should be more specific as to the actual records that will be transmitted to the Police Board.

17. Video release policy – Para. 554. *Id.* at 173. This paragraph acknowledges the CPD policy relating to the public release of videos of officers in the performance of their duties, including the discharge of their weapons. The media release of an image of an officer is prohibited by Section 6.4 of the Lodge's CBA. It states: "No photo of an Officer under investigation shall be made available to the media prior to a conviction for a criminal offense or prior to a decision being rendered by the Police Board, except when required by law." [Doc. 51-3 at 15].

The release of a video of an officer in the performance of his or her duties not only contradicts Section 6.4 of the collective bargaining agreement but also Section 7.5(cc) of the Freedom of Information Act, which states that recordings made under the Law Enforcement Officer-Worn Body Camera Act are exempt from disclosure, except to the extent authorized under the Act. Section 10-20(b) the Act provides for the circumstances under which disclosure of a recording may be made. 50 ILCS706/10-20(b). Those provisions are not referenced in the consent decree and should be.

In addition, the Illinois Vehicle Code protects the identification of law enforcement officers who detain a pedestrian in a public place. Section 11-212(b) provides that law enforcement officer identification, information, and driver or pedestrian identification information compiled by any law enforcement agency pursuant to the Act shall be confidential and exempt from public inspection and copying as provided under Section 7 of the Freedom of Information Act. 625 ILCS5/11-212(f). The Act defines detention on all frisks, searches, summons and arrests. "Whenever a law enforcement officer subjects a pedestrian to detention in a public place, he or she shall complete the uniform pedestrian stop card, which includes any existing form currently used by law enforcement containing all of the following information

required under this section...." *Id.* Section 11-212(b-5). It is this identification information that is exempt from disclosure, which means that the actions of a police officer should not be subject to public release pursuant to the consent decree.

18. Training for Police Board members – Para. 540. *Id.* at 166. Training topics for the Police Board members is specified in this paragraph. An additional topic on the provisions of the collective bargaining agreement negotiated by the Lodge and the other police unions with CPD should be included.

B. Matters Arising Under Bargaining Obligation of the IPLRA

The proposed consent decree also does not comply with the statutory requirements and rights protected under the Illinois Public Labor Relations Act (IPLRA). 5 ILCS 315/1, *et seq.* The IPLRA contains requirements that parties which fall under the statutory qualifications abide by a duty to bargain in good faith over mandatory subjects of bargaining. In this case, the proposed consent decree, in many cases, fails to recognize the City and CPD's duty to collectively bargain mandatory subjects with the Lodge. Therefore, the Consent Decree as proposed does not comply with state statute and should not be approved by the Court.

1. Crisis intervention policies - Para. 92, 108, and 111. [Doc. 107-1 at 36, 39 - 41]. For the Certified Crisis Intervention Officers, the CPD is to develop an implementation plan to analyze the need for crisis intervention services and to maintain a sufficient number of officers on duty in each watch of each district. A Lieutenant assigned as the CIT Coordinator will be responsible to select and remove CIT officers among other duties. Para. 117 (d), *Id.* at 42. All of the assignment, selection, determination of duties is appropriate subjects of bargaining under the IPLRA and the consent decree only assures impermissible unilateral action by the CPD in these areas. The CIT Team and program as stated in para. 87 are to be staffed by a certified CIT

Officer. Para. 87, *Id.* at 33-4. This paragraph does not indicate how the officers are to be selected or trained for this position, which is a mandatory subject of bargaining, as is the compensation officers in this position are to receive. *See also*, Para. 94, *Id.* at 36. There is no reference to the use of seniority for the assignment or promotion of officers to this position, as required by the CBA in Section 23.3. [Doc. 51-3 at 44]. There is no provision in this paragraph for the Lodge to engage in collective bargaining negotiations over the duties and working conditions for the officers to work in this assignment, nor is there a stated role for the Lodge to bargain over the assignment of the CIT Officers to districts and watches and the determination of the number of officers to be assigned as stated in Paragraph 108. [Doc. 107-1 at 39-40]. Police officers responding to an incident involving an individual in crisis will have to complete a report or similar Documentation as described. This is an additional duty that should be bargained with the Lodge. Para. 118, *Id.* 42-3.

A Crisis Intervention Advisory Committee will be responsible to provide guidance on developing policies for responding to individuals in crisis. The Lodge should be allowed to participate in this committee because most often the police officers are the first ones on the scene of persons in crisis. Para. 128, *Id.* at 48.

The exclusion of the Lodge from any involvement in these determinations of these activities and matters as stated in paragraphs 2, 26, 39-41, 87, 92, 108, 111, 117, 117 (d) and 118 not only creates the possibility of the Lodge having to file an unfair labor practice but also makes questionable the successful implementation of these very important programs. An employer has an obligation to bargain about new job duties, assignments, salaries and terms and conditions of employment. *O'Fallon Community Consolidated School District No. 90*, 25 PERI ¶ 19, 2009 WL 8154365 (2009). There is no sound reason not to require in the consent decree that the City

and the CPD engage in collective bargaining negotiations on these matters. Such bargaining with the Lodge is a way to assure sound participation and acceptance of the changes by the Lodge and its members and to avoid the filing of unfair labor practice charges.

When the Lodge met with the OAG in September, October and November of 2017, to discuss the list of twenty-two issues of great concern to the Lodge, one of them was the persistent unilateralism of the Department in creating new policies that directly affected the officers' wages, hours and conditions of employment. The OAG understood the problem indicated it would try to deal with the matter. Graham Declaration, Para. V at 5 [Doc. 81-4 at 5.]

2. Community policing - Policing to serve as points of contact of community organizations, paragraph 26 does not indicate how the officers are to be selected, designated to serve as "points of contact for organizations to assist with access to police services" to a variety to communities in Chicago. Para. 26. [Doc. 107-1 at 14]. Nor is there any statement as to how they will be trained for this position. These are matters which are mandatory subjects of bargaining, as is the additional compensation these officers are to receive for performing such duties. There is no reference to the use of seniority for the assignment or promotion of officers to this position, as required by the CBA in Section 23.3. [Doc. 51-3 at 44], which states that seniority shall be considered in promotions; a job with more pay and duties should be considered as a promotion. There is no provision in this paragraph for the Lodge to engage in collective bargaining negotiations over the duties and working conditions for the officers to work in this assignment.

The consent decree provides for a CPD Office of Community Policing to designate police officers to assess community needs that have experienced previous challenges with access to police services. Para. 26, [Doc. 107-1 at 14].

3. School-assigned officers - The consent decree provides that the CPD will develop a screening criteria to determine if officers have the qualifications and skills to be assigned to public schools and will revise policies regarding the school officers. Paras. 39, 40 and 41. [Doc.107-1 at 18-9]. The Lodge raises the same issues and concerns about bargaining over the selection process for the officers to be assigned to work in the Chicago Public Schools, as well as the additional duties they have compared to the ones that are already performed by school based officers. A recent report on school resources officers by the Office of Inspector General City of Chicago suggested that the Police Department should establish performance evaluations aligned with the duties and roles of the officers. *City of Chicago Office of Inspector General Review of the Chicago Police Department's Management of School Resource Officers*, at 10, September 2018. The report also noted there is no formal written guidance specifying the role of responsibilities of the school resource officers, and there are insufficient controls necessary for effective performance evaluations. *Id.* This report demonstrates the role the Lodge will need to bargain over these matters. The Lodge has a right to negotiate those matters that impact wages, hours and conditions of employment.

4. School Assigned Officers – Paras. 38-9. These paragraphs do not indicate how the officers are to be selected or trained for this position, which is a mandatory subject of bargaining, as is the compensation officers in this position are to receive. [Doc. 107-1 at 18]. There is no reference to the use of seniority for the assignment or promotion of officers to this position, as required by the CBA in Section 23.3. [Doc. 51-3 at 44]. There is no provision in this paragraph for the Lodge to engage in collective bargaining negotiations with the CPD over the new duties and working conditions for the officers to work in this assignment.

A policy to define the role of school officers is to be developed before the 2019-20 school year. There is no mention of the right of the Lodge to engage in collective bargaining negotiations over the modification of the policies and procedures and the impact they will have on the officers assigned to this position.

5. Rewards – Para. 48 - "CPD will create opportunities to highlight, rewards and encourage officer…engaging in problem solving techniques…." Para. 48. [Doc. 107-1 at 22]. There is no mention of the right of the FOP to engage in collective bargaining negotiations over the pecuniary and non-pecuniary rewards to be presented to officers who have furthered community partnerships, as stated in this paragraph. *See, Illinois University Board of Trustees*, 5 PERI ¶ 1035 (IELRB, 1989)

6. Discipline For On and Off Duty Misconduct – Paras. 57, 63, and 513. Regulation of officer conduct on disparaging persons or groups and development of a policy that prohibits sexual misconduct of CPD members. [Doc. 107-1 at 24, 26, 159]. This matter is a subject of bargaining because it involves a regulation and discipline of officer conduct both on and off-duty. Each of these regulations and policies has significant disciplinary implications for officers. The nature of the work rules and the related discipline action for enforcing them are mandatory subjects of bargaining. *City of East St. Louis*, 3 PERI ¶ 2011 (Il. SLRB 1987)(need to bargain about the failure to follow an order that could result in disciplinary action and the order could clearly affect an employee's employment conditions); *AFSCME v. ISLRB*, 190 Ill. App. 3d 259, 546 N.E. 2d 687 (1st Dist. 1988)(disciplinary procedures are mandatory subjects of bargaining); *Chicago Park District*, 9 PERI ¶ 3011 (Il. SLRB 1993).

7. Officer Notification of Misconduct – Para. 59 - Police officer will be required to notify CPD of other POs who engage in "misconduct". [Doc. 107-1 at 24]. This matter is a

subject of bargaining because it involves a regulation of officer conduct both on and off-duty. The words in this paragraph: discrimination, profiling or other bias-based policing are not defined, and the consequences of disciplinary action for violations of this rule are subject to bargaining.

8. Officer Interaction With Transgender Persons – Para. 61 - CPD is to develop, within six months of the effective date of the consent decree, policies guiding officers in their interactions with transgender persons. Para. 61. [Doc. 107-1 at 24-5]. This is a policy that will clearly have a disciplinary impact, but there is no reference for the Lodge to have a role in bargaining over this policy. This matter is a subject bargaining it involves the regulation of officer conduct.

9. Foot pursuits – Para. 168, *Id.* at 58. There is no mention of the right of the Lodge to engage in collective bargaining negotiations over the officers' duties and responsibilities in foot pursuits, and the discipline that might be issued against an officer for foot pursuit actions. Similarly, Paragraph 169 provides that CPD will review all foot pursuits associated with reportable use of force incidents to identify tactical, equipment, or training concerns *Id.* If this is a report that would lead to a disciplinary investigation, the Lodge has a statutory right to bargain with the CPD over the development of these issues.

10. Emergency First Aid – Paras. 174 and 175 require the Department to train officers to provide emergency first aid under a program known as Law Enforcement Medical and Rescue Training (LEMART), and officers trained in this program will be equipped with an individual first aid kit (IKAF). *Id.* at 59-60. This is an additional duty that officers will be required to undertake by providing life-saving aid to injured persons "as soon as it is safe and feasible to do so until medical professionals arrive." There is a bargaining obligation on this issue which is for

duties and additional pay that is similar to that provided to the fire fighters who are not paramedics but who have been trained to give first aid and who are designated as Emergency Medical Technician (EMT). There is also an issue of liability immunity for providing such aid. There is no mention of the role for the Lodge to engage in collective bargaining with the CPD on these matters.

11. Intervention – Paragraph 176 require an officer to intervene on behalf of a subject when another police officer is using excessive force. *Id.* at 60. There is no provision in this proposed rule as to the circumstances in which an officer might place himself or herself in danger in order to comply with the rule. This is a situation in which the officer may confront a serious risk to personal safety beyond that which is inherent in the normal performance of the police duties, thereby triggering a duty to bargain over the nature and circumstances of the intervention.

In addition, there are several other subjects of bargaining that arise from this paragraph: What is the duty or obligation for a police officer to "intervene" on the subject's behalf when another police officer is using excessive force? What are the consequences if a police officer does not intervene? What is the training protocol for such intervention, and what are the elements of the intervention that is expected? Is discipline to be expected if an officer does not intervene? There is no mention that the Lodge would have a bargaining role on this subject.

12. Point a weapon and report - Paras. 188-196, *Id.* at 62-4. This section requires the CPD by January 1, 2019, to develop a policy that provides guidance on weapons discipline, including the circumstances in which officers should not point a firearm at a person. The Department is also to clarify a policy that when an officer points a firearm at a person to detain the person the action is to be documented. Para. 189, *Id.* at 62. Due to the disciplinary nature of

this proposal, it is a matter that is a subject of bargaining, and there is no provision for bargaining over this issue.

The Lodge believes this is a matter of great personal safety to the officers and that they may be at serious risk to their safety beyond that which is inherent in the normal performance of their police duties. In the history of the Department, the officers have never had to worry about the pointing of a weapon and reporting of that fact. Approximately one and one-half years ago, a District 15 officer hesitated about the deployment of a weapon and in the momentary interval as the officer internally mulled the drawing of the weapon the officer was severely beaten and is now disabled. The Lodge believes that this is a critical safety issue for officers due to the likely hesitation of an officer concerned about the subsequent review of the deployment of a weapon, and does not want to increase the likelihood of similar incidents occurring. That is why the Lodge is so concerned about this new policy that is to be developed and issued.

Paragraph 189 of the proposed point and report policy creates a new standard on the use of a weapon by stating that the policy should limit officers in pointing their weapons only at a person "when objectively reasonable under the totality of the circumstances." *Id.* at 62. This standard is inconsistent with the standard required in the use of force policy stated in paragraph 153 of the consent decree. *Id.* 53-4. The consent decree provides that the use of force policy must ensure that "officers only use force that is objectively reasonable, necessary, and proportional under the totality of the circumstances." *Id.* at 62. Missing from the point and report requirement are the words "necessary and proportional." This inconsistency will clearly confuse officers as they are within a nanosecond of deciding whether to take action to protect themselves or the public. So the reporting requirement creates a problem for the officers.

13. Reporting use of force – Paras. 217-235- Effective January 1, 2019, the officers must report and document any use of force that meets the level 1, 2 or 3 standards. *Id.* at 68-74. These force levels described in these paragraphs constitute new terminology as to use of force, and the appropriate disciplinary matters that can arise from these new definitions should be the subject of bargaining between the Lodge and the CPD.

14. Body worn cameras - Paras. 236-42. *Id.* at 74-6.-There is no reference to a role for the FOP in bargaining on these matters, including the mandate to capture audio recordings. Currently, the impact of the body worn cameras on the police officers' operations is a subject of bargaining between the Lodge and the CPD. An Illinois Labor Relations Board Administrative Law Judge has found that the CPD violated the duty to bargain when it unilaterally imposed the body worn cameras on police officers and has recommended that the Labor Board order the City to bargain in good faith with the FOP over any impact of effect of the Body Worn Camera Pilot Program's 2017 expansion as it relates to police officer safety and discipline. *Fraternal Order of Police, Lodge No. 7*, Case No. L-CA-1-037 at 31-2 (Jan. 2, 2018). The City and the Lodge are currently bargaining over these subjects.

The requirement for periodic random review of officers' videos is not consistent with the requirements of the *Law Enforcement Officer-Warn Body Camera Act*, 50 ILCS 706, which provides that a video recording shall be destroyed after a 90-day storage period unless the encounter captured on the recording has been flagged as provided in the Act. 50 ILCS 706/10-20 (7) (B); Paragraph 238(g) [Doc. 107-1 at 75]. Random audits after that protected period would be in violation of the Act.

There is no protection in the consent decree an officer from the use of recordings for discipline purposes. The discipline procedures for allegation concerning the use of cameras

should be subject to collective bargaining between the Lodge and the CPD. 50 ILCS 706/10-21(a) /10-20 (9). *City of East St. Louis*, *supra* (need to bargain about the failure to follow an order that could result in disciplinary action and the order could clearly affect an employee's employment conditions).

15. Training plan and needs assessment – Paras. 269 – 292 provide for the creation of a training plan and a needs assessment. *Id.* at 83-90. The needs assessment includes the collection of information from CPD data, input from police officers, the community, court decisions and litigation, and officers' reaction to and satisfaction with the training they have received. Paragraph 271 (b) and (i). *Id.* at 84. The plan to question police offices without the participation of the Lodge is a clear attempt to by-pass the role the Lodge has as the exclusive bargaining representative of the police offices below the rank of sergeant. There is no reference to a role for the FOP on these issues.

16. Annual Performance Evaluations – Para. 353(h). [Doc. 107-1 at 106-7]. Annual performance evaluations are to be conducted by the officers' immediate supervisors. There is no reference to the Lodge having a labor right to bargain with the CPD over this subject. To the extent that such evaluation meetings become investigatory in nature, the officers are to be given rights under *Weingarten* to have Lodge representative present during the evaluation session.

Illinois appellate courts, the State Labor Relations Board, the Illinois Local Labor Relations Board and the Illinois Educational Labor Relations Board have all held that public employees possess *Weingarten*-type rights. *See, e.g. City of Highland Park*, 15 PERI ¶ 2004 (IL SLRB 1999); *Village of Streamwood*, 12 PERI ¶ 2021 (IL SLRB 1996), *aff'd by unpublished order sub nom. Hubbard v. Illinois State Labor Relations Board*, 14 PERI ¶ 4004 (1997); *State of Illinois, Departments of Central Management Services and Employment Security (Regina*

Vaughn), 4 PERI ¶ 2010 (IL SLRB 1988); *State of Illinois, Department of Corrections (Gerald Morgan)*, 1 PERI ¶ 2020 (IL SLRB 1985); *City of Chicago (Department of Buildings)*, 15 PERI ¶ 3012 (IL LLRB 1999); *City of Chicago (Department of Aviation)*, 13 PERI ¶ 3014 (IL LLRB 1997); *City of Chicago (Department of Sewers)*, 13 PERI ¶ 3009 (IL LLRB 1997); *General George S. Patton School District 133*, 10 PERI ¶ 1118 (IL ELRB 1994); *Summit Hill School District 161*, 4 PERI ¶ 1009 (IL ELRB 1987). All three Illinois Labor Boards have consistently applied Weingarten rights to public sector employees.

17. Evaluations – Para. 370, Doc. 107-1 at 111-12. CPD performance evaluation policies will identify, support and recognize offices' activities, performance and conduct through an assessment of specific quantitative and qualitative performance dimensions, but this is a subject of bargaining because the evaluations could lead to disciplinary action and promotional considerations. There is no reference to the Lodge having a role in evaluations as to their use for pay, assignment, or disciplinary purposes. *See*, *Suporlino Materials, LLC v. NLRB*, 645 F.3d 880 (7th Cir. 2011) (Establishing a new system of employee evaluations is ordinarily the subject of mandatory bargaining), *citing, Safeway Stores*, 270 NLRB 193 (1984);

18. Rating Period –Para. 373 – The rating period is not specified and most important is the lack of any minimum period of time for the supervisor to have had to observe the patrol officers for whom the supervision is responsible. [Doc. 107-1 at 112].

19. Officer Wellness and Support – Paras. 377-407, *Id.* at 113-122. The clear goal of this paragraph is to revise and enhance the existing system outlined in Appendix J of the CBA - the Behavioral Intervention System-Personnel Concerns Program. [Doc. 51-3 at 80]. This is clearly a mandatory subject of bargaining, and no changes should be made to the current contract without bargaining between the Lodge and the CPD. In addition, the consent decree should

provide for the confidentiality of the information that is obtained from the officers. An officer should have assurances that information gathered will be held confidential and not released, unless required by law.

20. Early Intervention System - Paras. 583-605. [Doc. 107-1 at 184-91]. This section is designed to identify the at-risk behavior of officers at an early point so that they can receive "tailored interventions." This is a direct attempt to alter or eliminate the current system provided for in the CBA, Appendix J, and should be a subject of bargaining. At para. 601, the consent decree provides that the CPD will "solicit input and feedback from representatives of its collective bargaining units during the development and implementation of the EIS." This plan runs directly counter to the duty to bargain in good faith on wages, hours and conditions of employment under Section 7 of the IPLRA. 5 ILCS 315/7.

21. Clinical Mental Health, Alcohol and Other Addiction Services – Paras. 390-402. These paragraphs are obviously designed to provide mental health counseling to officers, and a very significant benefit is the requirement that the CPD will expand its capacity to provide counseling services to the police officers by increasing the staffing of this unit to at least ten full-time counselors. [Doc. 107-1 at 117-20]). The Lodge recognizes this as an important development.

The other provisions of the mental health services section of the consent decree are clearly supplements to the Section 9.4 provision of the CBA that provides for psychological review and the involuntary removal of an officer from active duty due to psychological or psychiatric reasons. [Doc. 51-3 at 21]. This is a mandatory subject of bargaining, and there is no reference in this section to bargaining with the Lodge over related matters involving the officers in need of mental health assistance.

22. Equipment and Technology Audit – Paras. 415-418, [Doc 107-1 at 124-25]. The audit is an important tool to determine what is outdated, broken or otherwise in need of repair and is one of the twenty-two points raised by the Lodge in its meetings with the OAG. *Graham Declaration*, Para. M and Issues For Discussion. [Doc. 81-4 at 2 and 81-3 at 2]. However, there is no reference to the unsafe and inadequate buildings in which the officers work and train. The equipment inventory should include these buildings. Further, there is no reference to the Lodge having a role in providing information for determining the inventory, and this is the subject of a FOP proposal at the bargaining table in the current round of negotiations. The FOP has proposed changes in the CBA provision, Article 15, Safety Issues. [Doc. 51-3 at 30]. The consent decree states CPD will solicit feedback from the police union representatives, but this paragraph does not include the bargaining obligations under the IPLRA.

23. Additional disciplinary matters - Para. 437. This paragraph requires the CPD to prohibit all forms of retaliation, intimidation, and any action against any person who reports misconduct or cooperates with an administrative investigation. [Doc. 107-1 at 130]. This is a matter of discipline of officers and should be subject to collective bargaining with the Lodge.

24. Officer document review - Para. 450(c) - Officers are to be barred from reviewing documents obtained in the investigation. This is inconsistent with the right of the Lodge in representing the officers to see the files. *Id.* at 136. This right is based upon the IPLRA duty to bargain and provide information that is relevant and necessary for the Lodge to represent the officers in matters that arise under the CBA such as disciplinary grievances. *State of Illinois Dept. of Central Management Services*, 9 PERI ¶ 2032 (IL SLRB 1993).

25. Closing of an investigation – Para. 468(f), [Doc. 107-1 at 142-143]. This paragraph allows the Department to continue an investigation even though the complainant is

unavailable, unwilling, or unable to cooperate with an investigator. See CBA Appendix L para. 10 at 76, which states: "In the event that no affidavit is received within a reasonable time, the investigation will be terminated and no record of the complaint or investigation will appear on the Officer's Disciplinary History." [Doc. 51-3 at 84].

26. Witness statements – Para. 488(d)(i). [Doc. 107-1 at 149-50]. Witness policy as to discussions between officers is a subject of bargaining. This provisions prohibits police officers from discussing the facts relating to an incident with any witness until the witness has been interviewed by COPA. This would clearly mean that officers at the scene of an incident would not be able to discuss the incident. Such conversations between employees should be protected under the IPLRA provisions for concerted and protected activities. Prohibiting discussions chills the exercise of employee rights. *Advanced Services, Inc.* 363 NLRB No.71 (2015), citing to *Banner Estrella Medical Center*, 362 NLRB No. 137, slip op. at 2-3 (2015). There is no provision in the consent decree for the CPD to bargain with the FOP over such a policy.

27. Disciplinary decisions – Paras. 513-19 provide for the handling of final discipline decisions. [Doc. 107-1 at 159-160]. The subject of discipline is an issue of collective bargaining. There is a current unfair labor practice case involving this issue, and any changes to the system should be the subject of bargaining between the Lodge and the CPD. A Illinois Labor Relations Board Administrative Law Judge issued a recommended decision and order on November 8, 2017, recommending that the Labor Board order the CPD to cease and desist from failing and refusing to bargain in good faith concerning the decision to implement a disciplinary guideline system known as the CR Matrix and Guidelines [discipline rules and guidelines for punishment for various offenses]. *Fraternal Order of Police, Lodge #7*, Case No. L-CA-034 at

41-2 (November 8, 2017). See Appendix B. The consent decree does not provide for compliance with the IPLRA provisions to bargain in good faith on the issue of discipline.

28. Police board selection and Lodge participation – Paras. 531-32 provide for changes to the function of the Police Board, including the selection criteria for Police Board members. [Doc. 107-1 at 163-64]. The Lodge should have a role in developing the criteria for Police Board members because they have an important role in adjudicating discipline cases, and the Lodge representatives have had substantial experience in presenting and representing police officers in cases before the Police Board and in labor arbitration cases involving disciplinary suspensions of police officers. Their insights could be valuable in the development of selection criteria for Police Board members. In addition, the Lodge requests that at least one active duty police officer or former law enforcement officer nominated by the Lodge be allowed to sit on the Board and be a voting member.

29. Posting of each CPD policy and directive – Paras. 545, 626 and 629. *Id.* 160, 191 and 192. [Doc. at 167, 198 and 199]. CPD is to post policies and directives, but there is no reference to its bargaining obligation with the Lodge on issues that relate to wages, hours and conditions of employment. CPD is to develop, revise and implement policies to be consistent with the decree, and the Lodge should have a role in this process, as is its right under the IPLRA. Under paragraph 629, the policies are to be consistent with the applicable law, and this includes the IPLRA. The bargaining obligations should be specified in this consent decree, and the monitor should be required to ensure that the policies are issued in compliance with the IPLRA and to avoid unilateral determinations by the CPD of policies that relate to wages, hours and conditions of employment.

30. Policies for the investigation of alleged officer misconduct – Para. 450. [Doc. 107-1 at 136]. CPD is to develop policies on the administrative investigation of misconduct, but there is no reference to the right of the Lodge to engage in collective bargaining with the CPD about these matters.

31. CPD Policy Recommendations- Para. 565. [Doc. 107-1 at 176-77]. The quarterly meetings between CPD, COPA, the Police Board and the Deputy PSIG, are to be held to discuss trends and analysis of CPD data but there is no role for the Lodge to be present in discussing such policy issues which will implicate mandatory subjects of bargaining.

32. Force Review Board – Para. 577, *Id.* 182- A force review board is to be created to review any level 3 reportable use of force incident. The Lodge has an interest in this subject, which is not necessarily a matter of collective bargaining but one of improving the Department's operations and should have participation in the deliberations of this board. Lodge should be part of Force Review Board because its officers have an interest in the deliberations of the Board and the impact that these deliberations may have on the discipline of officers.

33. Immediate Revision or Clarification of Policy, - Para. 63, *Id.* 200. This paragraph provides for the immediate revision or clarification and issuance of a temporary policy or procedure due to an extraordinary circumstances. To the extent such policies and procedures impact wages, hours, and working conditions, the Lodge is a necessary party and to that end, such revisions should be a subject of bargaining.

34. Implementation Plan for Consent Decree – Para. 638. *Id.* at 201-02. Implementation plans that impact wages, hours, and working conditions of police officers are a

matter of bargaining between the Department and the Lodge. The consent decree does not provide for that or for bargaining on temporary policy implementations under para. 631, *supra.*

35. Changes in the Consent Decree – Para. 696, *Id.* at 216. The OAG and the City may agree under this consent decree to make changes to the consent decree. The Lodge has been excluded from this paragraph authorizing such changes despite its clear statutory and legal rights as exclusive bargaining representative.

36. Recommendations to Change Consent Decree - Para. 659 *Id.* at 207. The Monitor's recommendations to revise the consent decree should be submitted to the Lodge for review in the same manner that the consent decree provisions have provided to the Lodge and to the public for review. All matters effecting wages, hours, and working conditions should be subject to bargaining with the Lodge, as argued above.

37. Community oversight – Paras. 419-422. The consent decree refers to the role of the community organizations in the reform of the police department, but there is no reference to the role of the Lodge in this important endeavor, especially in the investigation and resolution of disciplinary matters, which are subjects of bargaining under the IPLRA. [Doc. 107-1 at 125-6].

C. Additional Concerns of the Lodge

1. Automated Electronic System – Para. 587, *Id.* 185-186. An automated electronic system is to be used to collect data about each CPD officer concerning use of force, arrests, injuries to persons in custody of the department, injuries resulting from conduct of department personnel, and a variety of other performance related factors including in Section (m) the disciplinary history of all CPD members. For reasons already expressed above, the maintenance

of disciplinary hearing records outside of the parameters of the collective bargaining agreement and applicable statutes should be prohibited by consent decree.

2. Independent Monitor. Para. 610, *Id.* at 193. The parties to this litigation are to jointly select an independent monitor to assess and report whether the requirements of the agreement have been implemented. The Lodge believes that the assessment of qualifications for the monitor and selection of the monitor is a matter in which the Lodge has great interest, and the Lodge should be able to participate in it.

3. Compliance with Consent Decree Provisions – Para. 643, *Id.* at 204. CPD members who violate the policies that are required by the consent decree are to be held accountable, and the Monitor may audit and review the policies as to whether CPD is enforcing its policies. The Lodge's collective bargaining provision on discipline should not be interfered with by the Monitor with respect to the enforcement of the provisions of the decree.

4. Community Group Meetings – Para. 669, *Id.* 210. The Monitor will participate with the MOA community groups on a quarterly basis to discuss the consent decree, but there is no role in this process for the Lodge, which did attend community meeting that were held by the OAG.

5. Meetings with CPD Officers – Para. 671, *Id.* at 210-11. The Monitor is to meet with CPD officers to respond to their "questions, concerns and suggestions." Meeting with the officers in this nature is a way to bypass the Lodge and engage in improper direct dealing with the police officers. This is an unfair labor practice. The monitor will also meet with the police union representatives. Such meetings with the union are within the appropriate level of labor law interaction, but the role of the Monitor meeting with employees without the union representatives

present is a cardinal violation of the labor law. Employer solicitation of employee issues, questions and grievances and the initiation to the "open door" to air such matters and grievances, regardless of employer motive is a way to interfere with employee use of the contractual grievance procedure and the exercise of the right to engage in concerted and protected activities to assist the union and to enable to union to bargain with the employer. *Eastern Telecom Corp*, 273 NLRB 237 (1984); *Ace Hardware Corp.*, 271 NLRB 1174 (1984).

6. Privileged Communications – Para. 684, *Id.* at 213 - The Monitor is to have prompt access to information the Monitor deems to be necessary except that which is privileged by the attorney-client privilege. There should be a reference here to the union-agent privilege as such privilege is expressly protected by Illinois statute. 735 ILCS 5/803.5.

7. Access to All Personnel Files – Para. 686 *Id.* at 214. OAG and its consultants are to have access to Documents and data related to the consent decree, but they should not have access to any files of the Lodge. This paragraph is not clear as to its purpose and full breadth of implications for Lodge legal rights as exclusive bargaining representative.

8. Lack of Standing – Para. 691, *Id.* at 215. - This court contrary to the statement in this paragraph does not have jurisdiction over the 42 U.S.C. Sect. 1983 allegations of this matter or the state issues because under Article III of the U.S. Constitution, the AG does not have standing to bring this law suit under Section 1983. *State of Ill. v. City of Chicago*, 137 F.3d 474 (7th Cir. 1998)

9. Enforcement of the Consent Decree – Para. 709, *Id.* 219-220. MOA parties, meaning the community coalition, have rights to seek enforcement of the decree, but the Lodge does not. It is extremely inequitable for the consent decree to exclude the Lodge from any

enforcement role. Lodge bargaining unit members are directly impeded or impacted by the consent decree, as are the FOP rights and obligations as exclusive bargaining representatives. The Lodge should not be excluded from any opportunity to enforce the decree. The OAG advised the Lodge that the MOA would be used for a limited purpose and that did not include t ability to obtain enforcement motion.

10. Policy Recommendations– Para. 565, *Id.* at 176-77. CPD policy recommendations and the meeting between CPD, COPA, the Police Board and the Deputy PSIG, but there is no role for the FOP in discussing such policy issues which will implicate mandatory subjects of bargaining.

11. Random audits of body worn cameras- Para. 576, *Id.* at 182. See the FOP comments at paragraphs , 11, 12 and 41, *supra.* The corrective action to be taken against officers for not complying with the CPD camera policy is a mandatory subject of bargaining between the FOP and the CPD.

12. Paras. 587 and 587 (m) *Id.* at 186-87. Automated electronic system to identify at risk officers. FOP should have a role in the development of this system, including safeguards as to who can access and possible disciplinary implications. The comments on the EIS in paragraph 40 above also apply to this paragraph. Section 587(m) refers to disciplinary history, and see prior discussion on this issue.

13. Different burdens of proof in discipline case. Paras 752, 769 and 795. The consent decree provides for two different standards of evidence for resolving disciplinary actions. There should be no inconsistency between the standards of proof with respect to how an officer is to be disciplined. The disciplinary finding of exonerated is based on a determination of

"clear and convincing evidence" that the conduct described in the allegation occurred and that is lawful and proper. Para. 752. [Doc.107-1 at 228]. A sustained finding is based upon a determination that there is insufficient evidence to prove the allegations by a "preponderance of the evidence." Para. 769. *Id.* at 230. The unfounded disciplinary finding is based on a determination of clear and convincing evidence that an allegation is false or not factual. Para. 795, *Id.* at 233. There is no sound reason to have two different standards or burdens of proof to be used in disciplinary matters. Section 8.1 of the collective bargaining agreement provides for a just cause standard, and the quantum of proof in any disciplinary matter by agreement of the parties is based upon the decisions of the labor arbitrators interrupting the collective bargaining agreement. Labor arbitrators have noted the differences between these two standards of proof. *How Arbitration Works*, at 948-53, (6th ed., Ruben ed., 2003).

14. The Lodge respectfully requests that its representative be allowed to testify in a question and answer format in the fairness hearing in order to more productively and efficiently present its concerns. This format would provide the Lodge with a fair way of expressing its concerns, and this format was noted in *Edwards v. City of Houston*, 78 F.3d 983, 1003 (5th Cir. 1966). The court noted that the fairness hearing that had been conducted by the district court did not give the would be interveners an adequate opportunity to set forth a factual basis for their challenges to the liability or remedial provisions of the consent decree, and in a review of the transcript of the fairness hearing revealed the deficiency in that regard. *Edwards*, 78 F.3d at 1003. One of the unions was prepared to offer live testimony of its president who would rebut several statements made by the police chief, and also to present witness, several police officers on the impact of the implementation of the decree. The district court refused to allow the witnesses to take the stand and instead ordered the union to submit affidavits from those persons

whom the union sought to call as witnesses. Rebuttal witnesses were not allowed. The Lodge requests this court proceed under a different format than that of the district court in *Edwards*.

CONCLUSION

The Lodge respectfully requests that this court review the provision of the consent decree in the context of these objections and concerns.

Respectfully submitted,

/s/Joel A. D'Alba
Attorney for Fraternal Order of Police Chicago,
Lodge No. 7.

Joel A. D'Alba
Asher, Gittler & D'Alba
200 West Jackson Blvd, Suite 720
Chicago, Illinois 60606
(312) 263-1500

ISSUES FOR DISCUSSION

- Include language in final Consent Decree: Nothing in this Agreement is intended to: (a) alter the existing collective bargaining agreements between the City and any Fraternal Order of Police , Chicago Lodge 7 employee bargaining unit; or (b) impair the collective bargaining rights of employees in those units under state and local law.

- Include language in final Consent Decree: Moreover, by entering into this Agreement, the City will be prohibited from relying on the Agreement in any Interest Arbitration proceeding; to the extent that any provisions of the consent decree conflict with the collective bargaining agreement, subsequent collective bargaining agreements, or interest arbitration award, the City and the AG will modify the consent decree to achieve goals in a manner which is compliant with the collective bargaining agreement language.

- The Police Department is sorely understaffed. The Lodge would suggest bringing the total number of sworn law enforcement officers up to 14,500, over a period of the next three (3) years–which must take into account those Officers who leave through attrition.

- From the Lodge's perspective, the amount of training provided by the CPD to its Officers regarding the use of firearms has diminished significantly over the years. This is true both for the initial training provided to recruits, as well as for the annual qualification training for all Officers. As part of the annual qualification process, Officers are required to watch an approximately fifteen (15) minute video which focuses on the liability incurred by municipalities as a result of improper deadly force encounters. This video does nothing to educate Officers in proper technique, but may cause Officers to hesitate when faced with a deadly force situation, resulting in a tragic encounter for Officers. Instead of focusing on municipal liability, the Lodge asserts that a training video that focuses on shooting fundamentals and safety would be a more appropriate video training tool. Indeed, the video should focus and reaffirm such things as proper stance, grip, sight line, trigger control and breathing techniques. Like any other skill, Officers who receive continued training and reminders as to the proper fundamentals and technique will be better suited to use their firearm when a situation arises. Similarly, focusing on basic firearm safety, including the care and maintenance of the firearm, will also assist Officers in the long run.

- From the Lodge's perspective, the amount of training provided by the CPD to its Officers regarding the use of force is non-existent. Require mandatory training, to take place off-site, in an instructional setting, on a regular basis.

- Promotions, if made properly, would ensure that the best candidates are awarded important positions, benefitting not only the CPD, but also the communities within which they serve. Unfortunately, that is not the case. Most troubling is the CPD's use of the "merit" promotions. The majority of promotions are made based on results of examinations which all Officers seeking a given promotion must take. "Merit" promotions are the way the City can avoid the examination results to promote certain favored Officers. The merit selection process is subject to exploitation and is widely viewed as a continuation of the City's

political patronage, or otherwise as a basis to reward family or political supporters. No one benefits from this system.

- The City's failure to include the Lodge in any meaningful process must stop. Recently, the CPD unilaterally changed various procedures which impact not only terms and conditions of employment of Police Officers, but also change how Officers might be disciplined. For example, CPD released a new Video Release Policy, in which the Lodge raised concerns stemming from its scope, coverage, proper notification to Lodge/member, etc., and requested, *inter alia*, that the Policy be modified to add a clause specifically indicating that the City still must continue to honor any obligation the City has with its various collective bargaining agreements (resulting in an unfair labor practice hearing at the State Labor Board). Not surprisingly, the Lodge received no response to its requests. Instead, one of the first videos released contained the home address of an active Police Officer, which the City had to scramble to remove after the Lodge raised it as a concern.

    - Similarly, the CPD recently informed the Lodge that it would be utilizing a new CR Matrix Guidelines and detailed CR Matrix. Once again, such an initiative would impact Officers' discipline. How the CPD disciplines the Lodge's members is a mandatory subject of bargaining. The CPD cannot unilaterally make changes to a system that has been in place for many years (and multiple Agreements) without first bargaining with the Lodge (resulting in an unfair labor practice hearing at the State Labor Board).

    - Further, the CPD unilaterally expanded the pilot program for body worn cameras to be implemented City-wide, without bargaining with the Lodge over the impact and discipline it will have on members (resulting in an unfair labor practice hearing at the State Labor Board).

    - Several months ago, the Lodge suggested the creation of a crime initiative task force at a meeting with representatives from the CPD's Management Labor Affairs. Although the CPD appeared interested in the concept, the Lodge has yet to hear back. The Lodge raises these examples to highlight that the City does not include the Lodge in discussing and evaluating initiatives about which the Lodge could provide valuable input. Rather, the CPD makes unilateral decisions and informs the Lodge after the fact. A more collaborative relationship between the CPD and the Lodge would go a long way towards addressing concerns and formulating viable solutions.

    - Address issues with the revised Use of Force model, investigatory stops and EIS-Wellness programs.

    - Perhaps including language in final Consent Decree that requires the CPD to meet and confer with the Lodge prior to implementing any new directives.

- Equipment/Safety Concerns: Equipment malfunctions. Equipment is missing. Officers do not have enough radios. Some of the buildings and facilities currently being used by the

CPD are outdated, resulting in unsafe or hazardous environments in which Officers are forced to work.

- With respect to vehicles and equipment, CPD is lacking. The Lodge had to beg the CPD to acquire more vehicles in the last round of negotiations. Apparently, the Department continues to have a lack of police vehicles available when Police Officers report to work their assigned watches, resulting in at least one District (the 9th District) having to combine two beats (911 and 912) into one during the day shift.

- FTO Program needs to be changed. In the past, up to 3 recruits are assigned to 1 FTO–in the Englewood District. This raises serious concerns. Also, one would question how effective the training provided by an FTO is when the FTO must oversee three recruits. Loading an FTO with three recruits does not accomplish that goal. Rather, it undermines the purpose, placing the officers and the community in which they serve at risk.

- It becomes more difficult for Police Officers to obtain time off to spend with their families or simply decompress (the Lodge believes this is due, in part, to the under staffing of sworn Officers). Include language in a consent decree that demands a certain percentage of Officers on each watch, in each district, be granted time off.

- Police Officers are now being asked to fill out more paperwork, effectively taking them out of patrolling, which is so desperately needed throughout the City (especially those areas with high crime rates). Require the City to have Officers utilize contact cards once again, rather than ISR.

- Address the issues with Police and Community Relations Improvement Act, *50 ILCS 727/1-1, et seq.* (the Act), which became effective on January 1, 2016, requiring the City to "have a written policy regarding the investigation of officer-involved deaths[.]" *50 ILCS 727/ 1-10(a).* The Act further requires that investigations of officer-involved deaths be conducted by at least two investigators, with the lead investigator certified as a Lead Homicide Investigator. *50 1LCS 727/1-10(b).* With only one inapplicable exception, the Act expressly prohibits involvement in such investigations by individuals employed by the law enforcement agency which employs the officer involved in the shooting. Id. A new General Order, G03-06, improperly assigns the duty to investigate to COPA.

  - The City is not in compliance with the Act because COPA is not a law enforcement agency as defined by the Act, nor are its employees (who are acting as investigators) certified as Lead Homicide Investigators as required by the Act. COPA Investigators are not law enforcement officers, but rather civilians, who, at best, have received a minimal (and insufficient) amount of training.

  - COPA is neither qualified to conduct such investigations, nor sufficiently independent to satisfy the Act. Moreover, given its control over the crime scene, COPA's lack of qualification as a law enforcement agency actively impedes the CPD's ability to

gather evidence and investigate the crime scene. Assignment of such investigations to a qualified, independent law enforcement agency, such as the State Police, would comply with the Act and allow for a proper investigation of the crime scene, both as to the underlying crime and the officer-involved death.

- The Lodge takes investigations of officer-involved deaths seriously and wants to see a proper investigation of such incidents by qualified agencies and investigators, as intended by the Act. A proper investigation benefits the public, the CPD, the Police Officers, and the communities within which they work.

- The Lodge has brought this matter to the Illinois Attorney General's attention in the past, as well as raising objections with the CPD and the City's Inspector General, all to no avail. Include language in final Consent Decree to address these concerns.

- Put an end to any quota requirements articulated by Sharon Fairley–the prior head of IPRA/current head of COPA.

- Allow the Lodge to have some input on COPA oversight.

- Add language requiring payments or penalties for false accusations against law enforcement officers.

- From the Lodge's perspective, it appears that local politicians (and certain community leaders) would rather shine a spot light on the men and women who live in and try to protect the City's neighborhoods, rather than tackle the underlying problems which lead to violence and death in certain parts of the City. Innocent mistakes made by Police Officers should not be criminalized. Gun and drug trafficking has increased. Gang membership and turf wars continue to escalate. The murder rates continue to rise. Create a task force with rank and file members to address these concerns.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL

Fraternal Order of Police, Lodge #7,	)	
	)	
Charging Party,	)	
	)	
and	)	Case No. L-CA-17-034
	)	
City of Chicago (Department of Police),	)	
	)	
Respondent	)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On January 3, 2017, the Fraternal Order of Police, Lodge #7, (Charging Party or Union) filed a charge with the Illinois Labor Relations Board's Local Panel (Board) alleging that the City of Chicago, Department of Police, (Respondent or City) engaged in unfair labor practices within the meaning of Sections 10(a)(4) and (1) of the Illinois Public Labor Relations Act (Act) 5 ILCS 315 (2014), as amended. The charge was investigated in accordance with Section 11 of the Act. On April 17, 2017, the Board's Executive Director issued a Complaint for Hearing.[1]

A hearing was conducted on July 27 & 29, 2017, in Chicago, Illinois, at which time the Union presented evidence in support of the allegations and all parties were given an opportunity to participate, to adduce relevant evidence, to examine witnesses, to argue orally, and to file written briefs. After full consideration of the parties' stipulations, evidence, arguments, and briefs, and upon the entire record of the case, I recommend the following:

I. PRELIMINARY FINDINGS

The parties stipulate and I find that:

1. The City of Chicago is a municipal corporation organized under the laws of the State of Illinois.

[1] This case was initially consolidated with Case No. L-CA-17-034 by the Executive Director. I bifurcated the cases at the conclusion of the hearing, in consideration of the Respondent's earlier request to bifurcate and both parties' successful efforts to keep separate the issues presented in each case.

2. The City of Chicago is a public employer within the meaning of Section 3(o) of the Illinois Public Labor Relations Act ("Act"). The City of Chicago operates the Chicago Police Department (CPD).
3. The City of Chicago is a unit of local government under the jurisdiction of the Local Panel of the Board, pursuant to Section 5(b) of the Act.
4. CPD is an executive department of the municipal government of the City. Its duties and responsibilities are established by ordinance at Chapter 2-84 of the Municipal Code of the City of Chicago ("MCC"), Chapter 2-84.
5. Fraternal Order of Police (FOP), Lodge No. 7 ("Charging Party") is the bargaining representative of a bargaining unit (Unit) consisting of all police officers employed by the City of Chicago Police Department below the rank of sergeant.
6. The FOP is and has been a labor organization within the meaning of Section 3(i) of the Act.
7. The parties stipulated to the testimony of Wynter Jackson, Director of Management Labor Affairs for the Chicago Police Department.

II. ISSUES AND CONTENTIONS

The issue is whether the Respondent violated Sections 10(a)(4) and (1) of the Act when it allegedly refused to bargain over its decision to implement the Complaint Register Matrix and Guidelines (collectively, "CR Matrix").

The Union argues that the Respondent violated the Act when it implemented the CR Matrix because it thereby unilaterally changed employees' terms and conditions of employment without bargaining with the Union. It contends that the CR Matrix is a mandatory subject of bargaining because it concerns disciplinary standards. Specifically, the Union argues that the CR Matrix replaces a subjective evaluation of employees' conduct with threshold standards, changes the standard of proof in all disciplinary cases, and expands the Superintendent's authority from that set forth in the contract. The Union further argues that the vagueness of the CR Matrix changes employees' terms and conditions of employment.

The Union denies that the CR Matrix is a matter of inherent managerial authority because an employer is required to bargain over its decision to modify the standards it uses to administer discipline, even if it has a legitimate reason for that change.

Finally, the Union asserts that the benefits of bargaining over the CR Matrix outweigh the burdens of bargaining on the Respondent's inherent managerial authority. The Union contends that the Respondent acknowledged the benefits of bargaining by seeking the Union's input, indicating it had time to meeting, and then proceeding to meet. In addition, the Respondent previously negotiated detailed disciplinary procedures including the appropriate penalties to govern discipline imposed through the summary punishment process. The Union also notes that the Respondent waived the right to negotiate changes to disciplinary procedures when it agreed to the zipper clause set forth in the parties' agreement.

The Respondent contends that it did not violate the Act when it implemented the CR Matrix because the CR Matrix is not a mandatory subject of bargaining. The Respondent asserts that the CR Matrix does not concern wages, hours, or terms and conditions of employment because it effected no change. It simply memorialized the Respondent's existing process for formulating and recommending disciplinary penalties. The CR Matrix did not change the types of misconduct subject to discipline, the Respondent's discretion to modify disciplinary penalties, the standard of proof used in investigations, the manner in which officers could challenge the discipline imposed, or the Superintendent's disciplinary authority.

Next, the Respondent contends that employee discipline is a matter of inherent managerial authority under the parties' management rights clause and the under the municipal code, both of which set forth the Respondent's authority to discipline employees. It argues that its establishment of a CR Matrix, which memorializes formerly unwritten penalty guidelines, falls within these stated managerial prerogatives because it furthers the Respondent's interests to administer discipline more efficiently and consistently. More generally, the Respondent argues that it has a strong managerial interest in using discipline to correct employee misconduct because enforcement of its disciplinary standards ensures that the Respondent can provide quality police services to the public.

The Respondent contends that the burdens of bargaining over the CR Matrix outweigh the benefits of bargaining to the decision-making process. The Respondent argues that its authority to select a penalty for misconduct, and in turn to provide its investigators with guidance on this issue through the CR Matrix, is a policy decision closely related to its mission of providing quality police services to the public. It asserts that bargaining over the selected penalty for any given infraction would be particularly burdensome on its responsibility to maintain discipline and to

enforce its rules where the Union can grieve any penalty imposed through CR investigation process. The Respondent emphasizes that it has always recommended disciplinary penalties for particular infractions, without first bargaining with the Union.

Finally, the Respondent contends that the Union contractually waived the right to bargain. It agreed to the management rights clause that confers upon the Respondent the authority to discipline union members, it agreed to other provisions regarding discipline, and it agreed to a zipper clause. In the alternative, the Respondent contends that it should not be held liable for a refusal to bargain where the Union refused its invitations to "meet and discuss" the CR Matrix.

III. FINDINGS OF FACT

The City of Chicago and the Charging Party are parties to a collective bargaining agreement covering the unit, with a term of July 1, 2012, through June 30, 2017. Dean Angelo Sr. was the President of FOP Lodge 7 from March of 2014, through April of 2017. Angelo helped negotiate language related to discipline for the 2012-2017 contract.

The parties concluded negotiations for the 2012-2017 agreement in 2014, and they executed the agreement on November 18, 2014.

Article 4 of the contract sets forth the Respondent's management rights. The management rights clause provides the following in relevant part:

> **ARTICLE 4 – MANAGEMENT RIGHTS**
>
> The Employer has and will continue to retain the right to operate and manage its affairs in each and every respect. The rights reserved to the sole discretion of the Employer shall include, but not be limited to, rights:
> …
> C. to set standards of service to be offered to the public;
> D. to direct the officers of the Department of Police, including the right to assign work and overtime
> …
> M. to suspend, demote, discharge, or take other disciplinary action against Officers for just cause; and
> N. to add, delete or alter policies, procedures, rules and regulations.
> …

Article 8 of the contract addresses Employee Security. Section 8.1 of that article sets forth the just cause standard and Section 8.8 sets forth the Superintendent's authority.

ARTICLE 8 – EMPLOYEE SECURITY

Section 8.1 – Just Cause Standard

No Officer covered by this Agreement shall be suspended, relieved from duty or otherwise disciplined in any manner without just cause.

Section 8.8 – Superintendent's Authority

The Superintendent's authority to suspend an Officer, as set forth in section 2-84030 of the Municipal Code of Chicago, shall be increased from the current limit not to exceed thirty (30) days, to a limit not to exceed three hundred and sixty-five (365) days.

In cases where the Superintendent seeks an Officer's separation from the Department, the Superintendent's current and past practice of suspending Officers for thirty (30) days and filing charges with the Police Board seeking the Officer's separation will not change.

Article 7 of the contract addresses summary punishment. The Respondent uses the summary punishment process to discipline officers for minor infractions. Sections 7.1(a)(1) and (2) specify the type of discipline that the Respondent may impose on its members through the SPAR process. This language also appeared in the prior contract. The parties added new language which provides that an officer could serve the summary punishment by deducting the equivalent days off without pay from his accumulated compensatory time, furlough days, personal days, or baby furlough days. The language provides the following in relevant part:

ARTICLE 7 – SUMMARY PUNISHMENT

Section 7.1 – Administration of Summary Punishment

It is agreed that the provisions contained elsewhere in this Agreement shall not apply to Summary Punishment action, which action shall be considered as an alternative to formal disciplinary procedures, provided that in each such action the following shall apply:

A. The Summary Punishment which may be administrated conforms to the "Notice to Supervisors Regarding Progressive Discipline," as set forth in this Agreement, and is limited to:
    1. Reprimand;
    2. Excusing a member for a minimum one day to a maximum of three days without pay.

> In all instances, the Summary Punishment shall be satisfied by deducting the equivalent day(s) off without pay from the Officer's furlough, personal days, or baby furlough days. In all instances, eight hours of accumulated elective time, including compensatory time, furlough, personal days, and baby furlough days, shall be equal to one day off without pay. If the Officer does not have sufficient accumulated compensatory time, then the days off shall be satisfied by means of days off without pay, unless the Officer elects to use his furlough, personal days, or baby furlough days.
>
> B. The Department shall promulgate, maintain and publicize reasonable guidelines which will specify those acts, omissions or transgressions, the violation of which will subject an Officer to Summary Punishment action, and the penalties for each such violation, which shall be uniformly applied.
>
> .....

Article 9 of the contract sets forth the grievance procedure. Section 9.6 of that article sets forth the manner in which employees may challenge reprimands and recommendations for suspension, excluding summary punishment. It specifies the process by which grievances over different levels of suspension would be resolved by the Respondent. In negotiating this provision, the parties did not propose or discuss what level of suspension would be appropriate for any given offense.

> **ARTICLE 9 – GRIEVANCE PROCEDURE**
>
> **Section 9.1 – Definition and Scope**
>
> A grievance is defined as a dispute or difference between the parties to this Agreement concerning interpretation and/or application of this Agreement or its provisions. Summary Punishment shall be excluded from this procedure, except as provided in Article 7.2. The separation of an Officer from service is cognizable only before the Police Board and shall not be cognizable under this procedure, provided however, that the provisions of Article 17[2] shall be applicable to separations.

Article 32 of the contract contains a Complete Agreement clause, which states the following:

> **ARTICLE 32 – COMPLETE AGREEMENT**

[2] Article 17 pertains to union representation.

> The parties acknowledge that during the negotiations which preceded this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the areas of collective bargaining. The understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Except as may be stated in this Agreement, each party voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to, or covered in this Agreement or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated and signed this agreement.

During negotiations for the 2012-2017 contract, the parties discussed the fact that the City's Office of the Inspector General would be more involved in investigating police misconduct. Respondent's Attorney Johnson informed Angelo that if the membership "had an issue with the future language that would be coming out at some point down the road, [that] the language of the contract would stand."

1. The Respondent's Disciplinary Processes

The Respondent maintains approximately 55 rules of conduct that govern police officers. It maintains these rules in a document entitled Rules and Regulations of the Chicago Police Department. The Police Board first established these rules in 1975. The Respondent imposes discipline on unit employees for violations of these rules through either the summary punishment process or, alternatively, through the complaint register process.

a. Summary Punishment Process

The summary punishment process is the means by which the Respondent corrects lesser transgressions by an officer that are observed by an officer's supervisor. The officer's supervisor selects the appropriate penalty by consulting the Summary Punishment Action Report (SPAR) Offense Table or "SPAR matrix."

The SPAR Matrix lists the offense, the transgression number that corresponds to the offense, a description of the offense, and the penalty ranges. These include penalty ranges for mitigated, normal and aggravated offenses. The supervisor then memorializes the summary

punishment in a Summary Punishment Action Report (SPAR). An officer may appeal summary punishment through the command ranks, but summary punishment is generally[3] excluded from the grievance procedure set forth in Article 9 of the parties' contract.

The Respondent implemented the SPAR Matrix 2013. The Union did not participate in its development, but the Respondent asked for the Union's comments and input. The collective bargaining agreement, in effect at the time, provided that "the Department shall promulgate, maintain and publicize reasonable guidelines which will specify those acts, omissions or transgressions, the violation of which will subject and Officer to Summary Punishment action, and the penalties for each such violation, which shall be uniformly applied." The Union never filed a grievance or unfair labor practice in response to the Respondent's implementation of the SPAR Matrix.

b. Complaint Register Process

The complaint register process is the means by which the Respondent corrects more severe transgressions by an officer and offenses reported by citizens who make complaints against officers.

i. Investigation

The Independent Police Review Authority (IPRA)[4] reviews all allegations of misconduct made against members of the police department by members of the public. It retains investigative authority over some categories of alleged misconduct, but transfers investigation of other categories of alleged misconduct to the Bureau of Internal Affairs (BIA), which in turn may delegate the investigation to the police district from which the complaint originated.[5]

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[3] Under Section 7.2 of the contract, an officer may grieve the imposition of summary punishment when it is the fourth instance of summary punishment he has received within a twelve-month period.

[4] The City of Chicago plans to replace IPRA with a new agency, the Civilian Office of Police Accountability (COPA).

[5] IPRA investigates four types of complaints: (1) excessive force; (2) domestic violence; (3) coercion; and (4) bias-based verbal abuse. It also conducts mandatory investigations, regardless of the alleged misconduct, for (1) officer weapon discharges (including gun, Taser, or pepper spray) and (2) death or serious injury in police custody. BIA investigates complaints that are outside of IPRA's jurisdiction. These include (1) criminal misconduct; (2) bribery and other forms of corruption; (3) drug or other substance abuse; and (4) driving under the influence, as well as all operational and other violations of the Respondent's rules.

At the conclusion of the investigation, the investigator makes one of the following four findings: (i) The allegation is unfounded, (ii) the allegation is not-sustained, (iii) the allegation is sustained, or (iv) the officer is exonerated. A sustained finding means that a preponderance of the evidence demonstrates that the officer engaged in the alleged misconduct. If the investigator determines that the allegations are sustained, the investigator or the accused officer's supervisor, a sergeant, recommends a disciplinary penalty. The penalties include "violation noted," reprimand, suspension, and separation.

ii. Penalty Selection/Recommendation and Changes to the Processes

Prior to 2017, the Department used an informal process to assess penalties at the conclusion of the Complaint Register investigation process. The investigators selected a recommended penalty based on historical penalties issued for similar instances of misconduct, and decisions, in similar cases, issued by arbitrators, the police board, or the courts. The sergeants similarly selected a recommended penalty by discussing the issue amongst themselves, consulting their lieutenant or captain, or asking the BIA what level of discipline the Department had issued for similar instances of misconduct.

The Respondent had no fixed penalties for the violations of its rules. It did not require investigators to recommend a certain penalty for a particular rule violation. The Respondent had no established penalty ranges that guided the investigators in recommending a penalty.

The sergeants and investigators considered mitigating and aggravating factors in assessing penalties, but they did so informally, without any written guidelines. The Respondent did not bar investigators and sergeants from considering mitigating factors for certain types of rule violations. The Respondent did not set forth any aggravating factors that required an investigator or sergeant to recommend a higher penalty.

On February 1, 2017, the Department replaced the informal process of penalty selection with the CR Matrix and Guidelines. The CR Matrix provides a guide that helps investigators and supervisors determine a recommended penalty for sustained allegations of misconduct investigated through the Complaint Register process. The investigators and supervisors must now consult the Matrix and Guidelines to determine an appropriate recommended penalty. The Matrix is a 47-page table that establishes penalties and/or penalty ranges that attach to different rule violations, and the Guidelines explain how the Department uses it.

The Matrix groups types of misconduct, e.g., Group 01 Verbal Abuse, Group 02 Alcohol Abuse, and Group 03 Improper Search. Within each group, the CR Matrix is further organized into columns labeled misconduct, category code, rules violation, and penalty range. The column labeled misconduct identifies the category of infraction, e.g. "Use of Profanity." The column labeled category code corresponds to the numerical code for that category of infraction, drawn from an internal document entitled Complaint Category Tables. The column labeled rules violation lists all the Department's rules, by number, that fall within the category code. The column labeled penalty range gives a short narrative description of the infraction, drawn from internal BIA documents, and sets forth the penalty or penalty ranges that an investigator/sergeant may recommend. The groups of misconduct, the categories of misconduct, the category codes, the referenced rule violations, and the descriptions of the infractions have existed for years.[6] However, the penalty ranges are new.

The CR matrix defines three possible penalty ranges for each category of rule violation: mitigated, presumptive, and aggravated. The investigator must begin at the presumptive range when selecting a recommended penalty. The mitigated range applies when the investigator has identified mitigating factors, i.e., factors that "do not excuse or justify misconduct but, where present, may indicate that a lesser penalty that the Presumptive Penalty range prescribed in the CR Matrix is appropriate." The aggravated range applies when the investigator has identified aggravating factors, i.e., factors that "increase the seriousness of the misconduct and, where present, may indicate that a more severe penalty than the Presumptive Penalty Range prescribed in the CR Matrix is appropriate."

The Guidelines provide examples of mitigating and aggravating factors. Mitigating factors include timely self-reporting, efforts to remedy the misconduct, acknowledgment of wrongdoing, acceptance of responsibility, complimentary history, whether the violation was intentional or inadvertent, and limited length of service and/or experience. Aggravating factors include supervisory status, length of service, experience, failure to accept responsibility, efforts to influence witnesses, retributive or retaliatory conduct, whether a member of the public is the alleged victim, whether the misconduct caused injury or harm, whether the misconduct exposes the Department or City to civil liability, prior disciplinary record for the preceding five years, prior

[6] O'Neill testified that the descriptions of the infractions, the complaint categories, and the complaint category codes, had existed since 1998, according to his personal knowledge.

warnings or notice about the conduct in question, vulnerability of the alleged victim, and evidence of unlawful bias.

The Guidelines provide that when an investigator proposes a recommended penalty, the "basis for [the] proposed penalty shall be the penalties set forth in the CR Matrix." When recommending a penalty, the investigator must provide an explanation of whether he found any specific mitigating or aggravating factors and the weight that he accorded to those factors in the context of the case. When an investigator recommends a penalty outside the presumptive range, he must provide a written justification that describes the mitigating or aggravating circumstances that warrant deviation from the presumptive range.

However, mitigated ranges and aggravated ranges are not applicable for every category of misconduct. Some categories of misconduct lack an aggravated range, some lack a mitigated range, and some lack both. When an identified range is inapplicable for a particular category of misconduct, the Matrix notes "N/A" next to the title of the range. For example, misconduct entitled "miscellaneous" within Group 01 Verbal Abuse has no mitigated penalty range, but it does have an aggravated penalty range. Misconduct entitled "theft" has no aggravated penalty range,[7] but it does have a mitigated penalty range. Misconduct entitled "Working While on the Medical Roll" only has a presumptive penalty.

There are 29 categories of misconduct for which both the aggravated and the mitigated ranges are inapplicable, and for which the presumptive range sets forth a single penalty—separation. These categories of misconduct fall within the following groups: Group 17 Medical Integrity,[8] Group 15 Drug/Substance Abuse[9], Group 09 Conduct Unbecoming Violations (Off

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[7] The highest penalty, separation, is the presumptive penalty.

[8] The categories of misconduct within this group that carry a presumptive penalty of separation, without any mitigated or aggravated penalty ranges include the following: Refusal of Direct Order For Physical Examination, Refusal of Direct Order for Psychological Examination, Working while on the Medical /IOD [Injury on Duty], Altering Medical Documents, False Reporting of IOD.

[9] The categories of misconduct within this group that carry a presumptive penalty of separation, without any mitigated or aggravated penalty ranges include the following: Refusal of Direct Order to Submit to Drug or Alcohol Screening/Test, Positive Drug Screen – Originated From Complaint, Positive Drug Screen – Recruit, Positive Drug Screen – Promotional Exam, Use/Abuse Drugs/Controlled Substance – On Duty, Use/ Abuse Drugs/Controlled Substance – Off Duty, DUI Drugs/Controlled Substance – On Duty, DUI Drugs/Controlled Substance – Off Duty.

Duty),[10] Group 08 Crime Misconduct,[11] and Group 06 Bribery/Corruption.[12] Not every category of misconduct within these groups sets forth the single appropriate penalty of separation.

There are two additional categories of misconduct for which both the aggravated and the mitigated ranges are similarly inapplicable, but where the presumptive penalty range is broader than a single penalty. These include offenses in Group 08 Crime Misconduct.[13] For those categories of misconduct, the presumptive penalty range is 31- to 365-days suspension.

Where the Matrix sets forth de facto ranges, rather than a single appropriate penalty, the investigator must consider the totality of the circumstances of the incident and the presence of any mitigating or aggravating factors in recommending discipline within the applicable penalty range. Some penalty ranges are narrow while some are considerably broader. For example, the mitigated range for violating a citizen's first amendment rights is a suspension of one to two days. Similarly, the presumptive range for failure to properly search an arrestee ("Search – Person/Property") is a 1- to 5-day suspension. By contrast, the presumptive penalty range for "Other misdemeanor arrest" is a 31- to 365-day suspension.

The CR guidelines further specify that the standard of proof in administrative cases is the "preponderance of the evidence" standard. This is the standard that applies to the investigation of the alleged misconduct. It is also the standard that the supervisor must consider when recommending a disciplinary penalty.

c. Review and Modification of the Recommended Penalty

The channels through which the Department reviews a recommended penalty have remained unchanged: In cases where an investigator sustains a finding and recommends a penalty

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[10] The categories of misconduct within this group that carry a presumptive penalty of separation, without any mitigated or aggravated penalty ranges include the following: Residency [failure to reside within City limits].

[11] The categories of misconduct within this group that carry a presumptive penalty of separation, without any mitigated or aggravated penalty ranges include the following: Robbery, Arson, Other Felony, Burglary, Auto Theft, Murder/Manslaughter, Criminal Sexual Assault.

[12] The categories of misconduct within this group that carry a presumptive penalty of separation, without any mitigated or aggravated penalty ranges include the following: Gang Affiliation, Extortion, Solicit/Accept Bribe (non-Traffic), Solicit/Accept Bribe (Traffic), Planting Controlled Substance or other incriminating evidence on Person, Planting Controlled Substance or other incriminating evidence in Premise, Planting Controlled Substance or other incriminating evidence in Vehicle, Planting Controlled Substance or other incriminating evidence – Other.

[13] Conspiracy to Commit a Crime and Sex Offense Other.

other than separation, the Department undertakes command channel review of the investigation. During command channel review, supervisors in the accused officer's chain of command review the investigation into the officer's misconduct, and have the opportunity to challenge the investigation, the findings, and the recommended penalty. Similarly, if a sergeant recommends the penalty, his commander must approve the recommendation and forward the recommendation to the BIA, which then initiates command channel review. In cases where an investigator or a sergeant recommends separation, the Department does not conduct command channel review. In all cases the superintendent reviews the recommendation and makes the final determination on the question of penalty.

However, before the Respondent implemented the CR Matrix and Guidelines, individuals who reviewed the recommended penalties had complete discretion to modify the recommendation. In part, for this reason, disciplinary penalties within the Department were inconsistent for similar instances of misconduct.

After the Respondent implemented the CR Matrix and Guidelines, the reviewers retained some discretion to modify the recommended penalties, but the Guidelines qualified that discretion. It noted that reviewers could modify a recommendation and deviate from the penalty ranges set forth in the Matrix in "unique and exceptional circumstances." Furthermore, it required the reviewers to provide a written statement outlining the reasons for the variation from the penalties outlined in the CR Matrix. In relevant part, the Guidelines state the following:

> The CR Matrix is to be used as a set of guiding principles in the administration of discipline. It does not prohibit the Chief of BIA, Chief Administrator of IPRA, Chief Administrator of COPA, the Inspector General (OIG), Command Channel Review (CCR) the Superintendent, of the Superintendent's designee, from assessing a different penalty where unique and exceptional circumstances may warrant. Moreover, the Superintendent retains the discretion to review and correct disciplinary determinations within his/her authority, either in favor of or to the disadvantage of a member, when the Superintendent considers it necessary to correct an injustice or to prevent harm to the Department. However, the administration of discipline must be based upon the fair, consistent application of disciplinary principles and guidelines and the exercise of reasonable and prudent judgment, and therefore variations from the appropriate penalties set forth in the CR Matrix must be accompanied by a written statement outlining the justification for the variation.
>
> ...

> When deviating from the Presumptive Range, or assessing a penalty outside of any of the ranges established in the CR Matrix, a written justification/explanation in the form of a To/From or electronic comments in CLEAR must be included in the investigative file articulating those factors justifying the penalty.

The Guidelines further specify that "while the concept of progressive discipline is appropriate for most types of infractions, some offenses… are so egregious that a single instance is sufficient for a recommendation of separation.

2. History and Development of the CR Matrix

Over the years, the Department received complaints and feedback from arbitrators, the court, and the Union that there were no clear guidelines for the penalties the Department recommended. Specifically, the Union complained that officers in different units were not treated consistently with respect to the disciplinary penalties they received.

The Respondent responded to those complaints in August 2008 when then-Superintendent Jodi Weis directed BIA to develop a disciplinary matrix. He intended the matrix to provide a transparent process for selecting penalties for different types of misconduct. Joseph Martinico, Chief Labor Negotiator for the City of Chicago, confirmed that the Respondent developed the CR Matrix so that the public would be aware of how the Department perceived the relative seriousness of the violations and the penalties that the Department would impose in response to those violations.[14]

An early draft of the CR Matrix existed in 2009. It included category codes, but the penalty ranges, the narrative description of the violations, and the rules violations were absent.

On December 7, 2015, the United States Department of Justice (DOJ) initiated an investigation into the Chicago Police Department, in response to the Laquan McDonald shooting. During the investigatory process, the DOJ asked whether the Respondent had a disciplinary matrix, and requested a copy of it.

In February 2016, Interim Superintendent, John Escalante, approved an initial draft of the CR Matrix. The draft included penalty ranges, a narrative description of the violations, and

[14] Martinico did not know whether the CR Matrix was publicly available.

reference to particular rule numbers, which the earlier draft from 2009 lacked. The Respondent provided a copy to the DOJ for review.

3. Announcement of the CR Matrix to the Union

On March 31, 2016, Wynter Jackson, Director of the CPD Management and Labor Affairs Section (MLAS), emailed the leadership of all bargaining units subject to the CR Matrix, which represented employees working for the Department, including the Union. The emailed letter announced the CR Matrix and attached a copy for their review. The letter also invited discussion and asked the unions for their questions or concerns. Angelo received this letter from Jackson along with the Matrix.

On April 1, 2016, Angelo replied to Director Jackson's March 31 email, attaching a letter. In this letter, Angelo acknowledged receipt of the draft CR Matrix, and stated that the Union considered the Matrix a mandatory subject of bargaining and thus, the Lodge would be open to discuss its implementation when collective bargaining sessions began for the next contract (which would occur in 2017). To the extent that the Matrix was making unilateral changes to the disciplinary system, the Union expressly objected.

On April 21, 2016, Director Jackson invited Angelo to a meeting with MLAS, BIA, and leaders of the other bargaining units, scheduled for May 4, 2016, to discuss any suggestions regarding the CR Matrix. In this letter, Director Jackson requested that the Lodge present any concerns or suggested changes concerning the Matrix so that all could be prepared to discuss said suggestions at the meeting. Director Jackson also invited Angelo to reach out to her via telephone if he had any questions.

Martinico testified that the Respondent invited the Union to discuss the CR Matrix because he believed that unions often make recommendations that improve the employer's policies and he stated that he believed the Union's input could be valuable in this case. However, he further commented that it would be burdensome on the Respondent's inherent managerial authority to bargain the level of penalty, before the Respondent imposed it, while simultaneously permitting the union to challenge whether the penalty was appropriate, after the Respondent imposed it.

On May 2, 2016, Director Jackson sent a letter to Angelo and the PB&PA units postponing the May 4 meeting. The meeting was postponed because the draft of the Matrix underwent further review and would be subject to revisions. Director Jackson informed Angelo that a revised Matrix

would be provided. Additionally, in the letter to the Union, Director Jackson addressed Angelo's April 1, 2016 correspondence as follows:

> While we may disagree with respect to whether the establishment of these guidelines is a subject of mandatory bargaining, the Department nevertheless seeks your input and recommendations, and we look forward to our discussion of this matter.

On September 9, 2016, Director Jackson sent Angelo a revised copy of the CR Matrix. This letter also set out the City's position as to why implementation of the Matrix was not a mandatory subject of bargaining, explained the City's purpose in implementing such a Matrix, and explained that the implementation of the Matrix would not affect disciplinary procedures. Moreover, Director Jackson once again invited the Union to provide input on the Matrix even though it was the City's position that the Matrix was not a mandatory subject of bargaining. Specifically, Jackson stated the following:

> Upon request, we will be happy to meet with you to discuss the considerations that went into the creation of the Matrix. We look forward to hearing your comments and observations. In light of prior exchanges with respect to an earlier version of this Matrix, it is incumbent on me to clarify a significant point: although the creation and the substance of this matrix is not subject to a bargaining obligation, we value and respect your input and expertise, and will listen attentively to any comments or observations you may have.

On September 12, 2016, Angelo responded to Director Jackson's September 9 letter. He reiterated the Union's position that implementation of the Matrix was subject to mandatory bargaining.

On September 26, 2016, counsel for the Union again told Director Jackson that the Union declined to participate in any discussions on the CR Matrix because implementation of the CR Matrix should be discussed in the upcoming negotiations for the next collective bargaining agreement.

4. Refinement of the CR Matrix Prior to its Finalization

In October 2016, the DOJ provided the Department with six comments on the CR matrix. First, the penalties were too low or inconsistent with what should be the Department's hierarchy of harm. Second, it did not provide a structure for progressive discipline. Third, the descriptions of the violations were vague and/or broad. Fourth, some descriptions were so narrow that officers

could escape accountability. Fifth, the penalty ranges were so broad as to make them meaningless. Finally, the matrix had inconsistent penalty ranges for similar offenses.

Joseph Martinico, Chief Labor Negotiator for the City of Chicago, reviewed the comments with representatives of the Department, and IPRA. He also spoke with an outside consultant and with outside counsel David Johnson. Martinico asked IPRA and Department representatives to rank complaint categories by severity and to ensure that the penalty ranges within each category reflected what the Department regarded as the most serious, and conversely, the least serious, types of misconduct. The Department then modified the Matrix so that it reflected its hierarchy of harm.

The Department also identified complaint categories that were similar in nature and adjusted the recommended penalties set forth in the CR Matrix so that similar types of offenses would warrant similar penalties.

On October 18, 2016, the Respondent met with the union that represents the Department's sergeants and lieutenants, the Policemen's Benevolent and Protect Association (PBPA). The PBPA suggested changes to the CR Matrix and the Respondent incorporated some of those suggested changes.[15] The PBPA advocated for a broader range of penalties so that the sergeants and lieutenants could exercise discretion in disciplining their subordinates. The PBPA noted that there should be a comment in the guidelines that repeated violations of minor infractions should not necessary result in progressive discipline. The Respondent incorporated this change into the CR Matrix.

5. Implementation of the CR Matrix

On January 1, 2017, Director Jackson informed Angelo that the CPD would publish the revised CR Matrix in the coming week. Director Jackson again invited comments from the Union. The Union again rejected the invitation and chose not to engage in any discussion with the Department regarding the CR Matrix, unless that discussion was part of collective bargaining of the successor agreement.

On January 27, 2017, the Department published the CR Matrix to BIA's website and it went into effect on February 1, 2017.

[15] The PBPA has also filed a charge against the Respondent alleging that the Respondent violated the Act by unilaterally implementing the CR Matrix. See Case No. L-CA-17-038.

6. DOJ's Report on its Investigation of the Chicago Police Department

On January 13, 2017, the DOJ issued a 161-page report summarizing its investigation of the Department. The DOJ found that the Department's "deficient accountability systems contribute to the Department's pattern or practice of unconstitutional conduct."

The DOJ stated that the disciplinary system used by the Respondent at the time of the DOJ's investigation was ineffective. It noted that the Respondent's system for imposing discipline on officers "suffer[ed] from systemic deficiencies that undermine[d] its fairness, consistency, and effectiveness." Specifically, it commented that the lack of clear guidance on appropriate penalty ranges, prior the Respondent's creation of the CR Matrix, undermined the legitimacy and deterrent effect of the discipline.

The DOJ noted that the Respondent's creation of a disciplinary matrix and guidelines was "an important step towards providing greater consistency and clarity in discipline for officer misconduct." However, the DOJ also commented that the Matrix remained deficient because the its guidelines allowed the ultimate decision-makers to select a penalty outside the Matrix in "unique and exceptional circumstances," but then failed to define those terms. It further noted that such lack of specificity "leaves the door open for less well-disposed individuals to favor or disfavor officers according to whim."

The DOJ reiterated some of the concerns it expressed after it reviewed the initial draft of the Matrix. It noted that some disciplinary ranges set forth in the revised Matrix remained too broad. In addition, the disciplinary ranges for some of the most egregious offenses did not include separation.

The DOJ also commented that the Respondent's failure to provide officers with "sufficient direction, supervision or support" contributed to the Respondent's disciplinary problems. It noted that policing is a "high-stress" profession," that the stress is "particularly acute" in Chicago, and that stressors "play out in harmful ways for police officers." The DOJ emphasized that the pressures of policing are "not an excuse for [officers to] violat[e] the constitutional rights of citizens they serve." However, it acknowledged that "high levels of unaddressed stress can compromise officer well-being and impact an officer's demeanor and judgment, which in turn impacts how that officer interacts with the public."

IV. DISCUSSION AND ANALYSIS

The Respondent violated Sections 10(a)(4) and (1) of the Act when it unilaterally implemented the CR Matrix because the CR Matrix is a mandatory subject of bargaining and the Union did not waive the right to bargain over it.

Parties are required to bargain collectively regarding employees' wages, hours and other conditions of employment—the "mandatory" subjects of bargaining. City of Decatur v. Am. Fed. of State, Cnty. and Mun. Empl., Local 268, 122 Ill. 2d 353, 361-62 (1988); Am. Fed. of State, Cnty. and Mun. Empl. v. Ill. State Labor Rel. Bd., 190 Ill. App. 3d 259, 264 (1st Dist. 1989); Ill. Dep't of Cent. Mgmt. Serv., 17 PERI ¶ 2046 (IL LRB-SP 2001); Cnty. of Cook (Juvenile Temporary Detention Center), 14 PERI ¶ 3008 (IL LLRB 1998). It is well-established that a public employer violates its obligation to bargain in good faith, and therefore Sections 10(a)(4) and (1) of the Act, when it makes a unilateral change in a mandatory subject of bargaining without granting prior notice to and an opportunity to bargain with its employees' exclusive bargaining representative. Cnty. of Cook v. Licensed Practical Nurses Ass'n of Ill. Div. 1, 284 Ill App. 3d 145, 153 (1st Dist. 1996).

In Central City, the court set forth a three-part test to determine whether a matter is a mandatory subject of bargaining. The first question is whether the matter is one of wages, hours and terms and conditions of employment. Cent. City Educ. Ass'n, IEA-NEA v. Ill. Educ. Labor Rel. Bd. ("Central City"), 149 Ill. 2d 496 (1992). If the answer to that question is no, the inquiry ends and the employer is under no duty to bargain. Central City, 149 Ill. 2d at 522-23. If the answer is yes, then the second question under the Central City test is whether the matter is also one of inherent managerial authority. Id. If the answer is no, then the analysis stops and the matter is a mandatory subject of bargaining. Id. If the answer is yes, the Board will balance the benefits that bargaining will have on the decision-making process with the burdens that bargaining will impose on the employer's authority. Id.

1. Does the CR Matrix concern "wages, hours and terms and conditions of employment?"

The Respondent's implementation of the CR Matrix and Guidelines concerns wages, hours, and terms and conditions of employment because it changed the disciplinary consequences to

employees for violating the Respondent's rules and changed the Respondent's procedures for selecting disciplinary penalties.

A matter concerns wages, hours, and terms and conditions of employment for purposes of mandatory bargaining if it (1) involves a departure from previously established operating practices, (2) effects a change in the conditions of employment, or (3) results in a significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for those in the union. Cnty. of Cook v. Illinois Labor Relations Bd., 2017 IL App (1st) 153015 ¶ 46 (citing Chicago Park District v. Illinois Labor Relations Board, Local Panel, 354 Ill. App. 3d 595 (1st Dist. 2004)); Int'l Bhd. of Teamsters, Local 700 v. Illinois Labor Relations Bd., Local Panel, County of Cook, 2017 IL App (1st) 152993, ¶ 33. Not every change in working conditions violates the Act; the change must be material, substantial, and significant. Vill. of Westchester, 16 PERI ¶ 2034 (IL LRB-SP (2000); City of Peoria, 11 PERI ¶ 2007 (IL SLRB 1994); Alamo Cement Co., 277 NLRB 1031 (1985); Peerless Food Prods., 236 NLRB 161 (1978). However, the Board has noted that, "as an axiomatic precept of labor relations law, the negotiability of discipline and discharge standards and procedures is well established." Cnty. of Williamson, 15 PERI ¶ 2003 (IL SLRB 1999) (employer's refusal to bargain discipline and discharge procedures violated the Act).

More specifically, the National Labor Relations Board has held that an employer changes the status quo when it alters the scope of the discipline and the method for determining the level of discipline it applies. Windstream Corp., 355 NLRB 406 (2010), incorporating 352 NLRB 44, 49 (2008); The Toledo Blade Co., Inc., 343 NLRB 385, 387 (2004). The Illinois Labor Relations Board and its ALJs have similarly held that an employer materially changes employees' working conditions when it establishes new rules that carry disciplinary consequences, establishes new disciplinary penalties, or otherwise modifies the disciplinary consequences to employees for violating its rules. City of Springfield (Office of Public Utilities), 9 PERI ¶ 2024 (IL SLRB 1993) (employer established new rules and penalties); Vill. of Westchester, 16 PERI ¶ 2034 (employer established new threshold for determining how much sick leave was subject to potential discipline); see also Chicago Transit Authority, 22 PERI ¶ 120 (IL LRB-LP ALJ 2006) (employer changed progressive discipline framework)[16].

[16] This is a non-precedential decision, but its reasoning is persuasive.

Here, the Respondent changed the disciplinary consequences to employees for violating the Respondent's rules because it designated new penalty ranges for each category of rule violation. By design, the penalty ranges in the CR Matrix do not reflect the penalties that the Respondent historically applied for the identified rule violations. Instead, as the Respondent's witness explained, the CR Matrix represents "a forward[-]looking approach rather than one that relies predominantly upon the historical application of discipline in the Department." Accordingly, investigators no longer base their recommended penalties on the types of penalties that the Department had issued in similar cases or the discipline confirmed as appropriate by arbitrators, the courts, and the Police Board in similar cases. Rather, investigators must select a recommended penalty from within the newly-established penalty ranges set forth in the CR Matrix.

The Respondent's refinement of its draft CR Matrix confirms that the present iteration of the CR Matrix represents a novel framework of penalty ranges, and that it does not simply memorialize the Respondent's unwritten practices. Even if the Respondent used its past practices as the initial framework for the CR Matrix, as the Respondent suggests, it later changed the penalty ranges in response to feedback from the Department of Justice (DOJ). The DOJ commented that the penalty ranges in the draft CR Matrix were too low, that the penalty ranges were inconsistent with an appropriate "hierarchy of harm," and that the draft CR Matrix arbitrarily included different penalty ranges for similar rule violations. In response, IPRA and Department representatives ranked complaint categories by severity and ensured that the most severe violations carried the highest penalty. The Department also adjusted the recommended penalties for violations of rules within similar complaint categories so that they were more consistent. This demonstrates a change. Star Tribune, 295 NLRB 543, 563 (1989)(ALJ held that employer's establishment of a discipline schedule for drug/alcohol offenses was a change to the status quo where "previous disciplinary practices had been often intend[ed]ly inconsistent and in no way tied to a specific penal code"; parties did not file exceptions to this part of the ALJ's decision); cf. City of Quincy, 6 PERI ¶ 2003 (IL SLRB 1989) (employer simply codified existing policy and did not change the status quo) and Markle Manufacturing Co., 239 NLRB 1142, 1147 (1979).

The Respondent's admissions further demonstrate that the same misconduct will now carry a different disciplinary consequence for many employees than it would have carried before the Respondent instituted the CR Matrix. The Respondent affirms that the new process was intended to create consistency in the penalties assessed within complaint categories, which was absent

before, and that it no longer uses its historical applications of discipline to determine future penalties. Finally, the Respondent concedes that the penalty ranges newly reflect a "hierarchy of harm," which was not reflected in the Respondent's former range of penalties. Compare City of Springfield (Office of Public Utilities), 9 PERI ¶ 2024 (employer changed the status quo by establishing new rules and disciplinary penalties) and Chicago Transit Authority, 22 PERI ¶ 120 (IL LRB-LP ALJ 2006) (employer newly established suspension as the disciplinary penalty when employees had violated one of its rules for the second time) with Vill. of Summit, 28 PERI ¶ 154 (IL LRB-SP 2012) (employer's new investigatory method did not change status quo where employer did not change its disciplinary rules or penalties).

Next, the Respondent changed the procedure for determining the level of discipline it applies by placing new restrictions on its agents' discretion at all levels of penalty selection and review. Here, sergeants/investigators previously exercised broad discretion to recommend any level of penalty for rule violations, and members of management who reviewed the recommended penalties exercised similarly broad discretion to modify them. Indeed, the inconsistent penalties imposed by the Respondent for identical violations are proof of this discretion. Now, absent mitigating or aggravating factors, sergeants and investigators must recommend a penalty within the presumptive range set forth in the CR Matrix since the guidelines mandate that the "basis for [the] proposed penalty shall be the penalties set forth in the CR Matrix." Furthermore, in some cases, that presumptive range is either exceedingly narrow (e.g., a two- to five-day suspension) or it is not a range at all and instead identifies separation as the single appropriate penalty. The discretion of upper management to change these recommended penalties is similarly more narrow under the CR Matrix because upper management may deviate from the CR Matrix's framework only in "unique and exceptional circumstances."

In fact, the CR Matrix newly imposes a zero-tolerance policy for certain category code violations by requiring investigators to recommend separation as the penalty and prohibiting them from considering mitigating circumstances in such cases. For example, the CR Matrix requires investigators to recommend separation for 29 different category code violations including (i) working while on the medical roll, (ii) refusing to submit to drug testing, (iii) testing positive on a drug screen, (iv) and use of a controlled substance while off duty, among many others. When the investigator finds that the allegation is sustained, he must recommend separation because it is the only available penalty. Windstream Corp., 355 NLRB 406 (2010), incorporating, 352 NLRB at

49 (employer changed methods by which policy would be enforced by applying zero-tolerance policy for existing work rule violation); The Toledo Blade Co., Inc., 343 NLRB at 387 (employer abandoned progressive disciplinary policy and instead determined discipline by looking at each instance of misconduct in isolation); Bhp (Usa) Inc., 341 NLRB 1316, 1322 (2004) (employer defined the levels of discipline, including discharge, for specific combinations of unexcused absences and tardiness where none had existed before).

Contrary to the Respondent's contention, management's authority to review and change the recommended penalty of separation in such cases does not eliminate the existence of this change or its impact on employees' terms and conditions of employment. First, the change arises from the Respondent's announcement of a zero-tolerance approach at the penalty recommendation stage. It does not turn on whether the Respondent elects to enforce that approach in any particular case. Windstream Corp., 355 NLRB 406 (2010), incorporating, 352 NLRB at 50 (employer changed the status quo by implementing a zero-tolerance policy, despite the fact that the employer did not apply the policy when it had the opportunity to do so); Graymont Pa, Inc., 364 NLRB No. 37 at *13 (2016) (ALJ noted that employer's discretion in determining whether to apply new rules did not detract from the change; NLRB affirmed finding of violation). Second, as a practical matter, the structure of the review process renders it unlikely that management will adopt a penalty different from the penalty of separation that the investigator must recommend. Upper management must always provide a written justification for adopting a penalty outside the matrix, but in zero-tolerance cases it will have no ready-made list of mitigating circumstances from which to choose. Although investigators must ordinarily explain their recommended penalty to the reviewer, there is little to explain where there is only one choice. The reviewer must therefore comb through the investigatory file to find a rationale for assessing a lower penalty. Accordingly, this streamlined and more regimented approach to penalty assessment renders it less likely that the Superintendent will deviate from the CR Matrix's provisions in cases where the CR Matrix mandates that investigators apply a zero-tolerance approach.

Even if the Board determines that the CR Matrix does not establish a zero-tolerance approach to certain types of violations, the Respondent undoubtedly changed the circumstances it considers relevant to the selection of a penalty for those identified categories of misconduct. At the initial penalty selection stage, the CR Matrix forecloses consideration of mitigating factors by the investigator during the penalty selection process for 29 different category code violations

because it mandates that the investigator recommend the penalty of separation. Indeed, the CR Matrix clearly provides that mitigating factors are not applicable in those cases, noting N/A in the space reserved for the mitigated range. At the review stage, the CR Guidelines similarly restrict the investigator's supervisor and the Superintendent[17] from considering the full range of mitigating circumstances they previously could have considered. The guidelines specify that the Superintendent, the Chief of BIA, the Chief Administrator of IPRA, the Chief Administrator of COPA, and the Inspector General (OIG) may select a penalty outside the CR Matrix only in "unique and exceptional circumstances." While these terms are not defined, they narrow the scope of mitigating circumstances that these reviewers may consider because they necessarily foreclose consideration of more common mitigating circumstances, such as a complimentary work record and lack of experience. Although the Superintendent still retains discretion to "review and correct disciplinary determinations…[when he] considers it necessary to correct an injustice or to prevent harm to the Department," this language similarly circumscribes his discretion, where no such limitation existed before.

Notably, by making the penalty of separation more likely in such cases, the Respondent has also decreased employees' likelihood of success on appeal from sustained findings by effectively channeling the appeal to a forum less favorable to employees. Employees may appeal the Superintendent's penalty of separation only to the Police Board; they cannot proceed to arbitration. See CBA Article 8. Yet, when faced with the types of cases to which the zero-tolerance approach applies (i.e., criminal conduct and misconduct involving moral turpitude), these two forums apply different evidentiary standards. The Police Board applies a lower evidentiary standard of proof, which is less favorable to employees, while arbitrators may apply a higher evidentiary standard of proof, which is more favorable to employees. Specifically, the Police Board applies a preponderance of the evidence standard for police officers,[18] even if criminal conduct is involved, but arbitrators may require the employer to prove the violation by the higher, clear and convincing evidence standard in those same types of cases.[19] Vill. of Posen v. Ill.

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[17] Recommendations for separation are not subject to command channel review and instead proceed to the Superintendent for review and finalization.

[18] Teil v. City of Chicago, 284 Ill. App. 3d 167, 170 (1st Dist. 1996).

[19] In addition, the arbitrator's selection of the "preponderance of the evidence" standard would likely withstand an argument that the award violates public policy because the "quantum of proof" used in such cases is a question of law, not policy. Vill. of Posen, 2014 IL App (1st) 133329 ¶ 39.

Fraternal Order of Police Labor Council, 2014 IL App (1st) 133329 ¶ 40; see also Elkouri & Elkouri, *How Arbitration Works*, 949-953 (6th ed. 2003) ("in cases involving criminal conduct or stigmatizing behavior, many arbitrators apply a higher burden of proof, typically a 'clear and convincing evidence' standard, with some arbitrators imposing the 'beyond a reasonable doubt standard'"). Accordingly, the Respondent has not only changed the penalty assessment process, it has also reduced the employee's likelihood of success on appeal from sustained allegations arising from particular complaint categories.

Contrary to the Respondent's contention, the Respondent's historical discretion to select a penalty does not shield it from a finding that it changed the status quo where, as discussed above, it now exercises that discretion differently and in a more circumscribed manner. County of Cook and Sheriff of Cook County, 32 PERI ¶ 70 (IL LRB-LP 2015); Vill. of Westchester, 16 PERI ¶ 2034; Windstream Corp., 355 NLRB 406 (2010), incorporating 352 NLRB at 51; Toledo Blade Co., Inc., 343 NLRB at 387. Indeed, both the Illinois Labor Relations Board (Board) and the National Labor Relations Board (NLRB) have rejected such arguments. For example, the Board in Village of Westchester held that an employer's discretion to discipline employees for "excessive" sick leave use did not privilege the employer to unilaterally define that term using objective measures when it previously judged "excessive" sick leave subjectively. Vill. of Westchester, 16 PERI ¶ 2034. Similarly, the Board in County of Cook and Sheriff of Cook County held that an employer's discretion to revoke secondary employment based on attendance and medical time did not privilege the employer to unilaterally establish objective measures of attendance that would trigger revocation of the employer's permission to engage in secondary employment. County of Cook and Sheriff of Cook County, 32 PERI ¶ 70. Likewise, the NLRB in Windstream Corp. held that the employer's discretion to discipline employees for violating its ethics and integrity guidelines did not privilege the employer to apply the highest penalty without regard to the employee's work record or the circumstances of the alleged violation. Windstream Corp., 355 NLRB 406 (2010), incorporating, 352 NLRB at 51. Finally, the NLRB in Toledo Blade Co., Inc. held that the employer's discretion to discipline employees for printing errors did not privilege the employer to determine penalty on a case-by-case basis, when it had previously applied principles of progressive discipline. Toledo Blade Co., Inc., 343 NLRB at 387.

Indeed, the Respondent's claim, that the CR Matrix and Guidelines effected no change, is further belied by the fact that the Respondent sought one. The Respondent identified the failings

of its prior approach to discipline: It had no clear penalty guidelines, discipline was inconsistent, and bargaining unit members in different units therefore received different levels of discipline for the same violation. The Respondent implemented the CR Matrix to standardize its approach to discipline, to eliminate the inconsistent application of discipline, and to newly provide employees with clear notice of the consequences for failing to abide by the Department's standards. It is difficult to reconcile the Respondent's stated goals, to achieve disciplinary changes, with its claim that it maintained the status quo.

Finally, the fact that the Respondent maintained the same underlying rules and the same investigatory standard[20] does not prove that the Respondent maintained the status quo of employees' terms and conditions of employment in light of the above-referenced changes. While the Respondent does not define misconduct differently, it has changed the disciplinary consequences to employees for engaging in such misconduct, the method by which it selects the penalty, and the circumstances sufficient to justify a change from the penalty recommended by the investigator in certain cases. These amply demonstrate a change to employees' terms and conditions of employment. See Windstream Corp., 355 NLRB 406 (2010), incorporating 352 NLRB 44, 49 (2008) (employer enforced existing work rule with new, zero tolerance policy); The Toledo Blade Co., Inc., 343 NLRB at 387 (employer abandoned progressive discipline and looked at each instance of misconduct in isolation); Chicago Transit Authority, 22 PERI ¶ 120 (IL LRB-LP ALJ 2006) (employer eliminated one step in progressive discipline process).

In sum, the CR Matrix and Guidelines concern wages, hours, and terms and conditions of employment.

2. Matter of Inherent Managerial Authority

The CR Matrix is also a matter of inherent managerial authority.

Section 4 of the Act states in pertinent part that "employers shall not be required to bargain over matters of inherent managerial policy, which shall include such areas of discretion as the function of the employer, standards of services, its overall budget, the organizational structure and selection of new employees, examination techniques and direction of employees." 5 ILCS 315/4.

[20] The Union contends that the Respondent changed its investigatory standard to the "preponderance of the evidence" standard, but it has not presented evidence that the Respondent ever used a different standard at the investigatory stage to determine whether an officer violated its rules.

In discussing statutory language identical to Section 4 of the Act, the Illinois Supreme Court in Board of Trustees of the University of Ill. v. Ill. Educ. Labor Rel. Bd., 224 Ill.2d 88, 104 (2007), noted that "[w]hile the statutory list is not exhaustive, it establishes characteristics of managerial rights which are not subject to mandatory bargaining." Accordingly, to satisfy the second prong of Central City analysis, the Respondent must link the objective of the challenged policy with a core managerial right. County of Cook, 2017 IL App (1st) 153015, ¶ 56.

Rules of conduct and disciplinary penalties concern a matter of inherent managerial authority if the employer can show they are necessary for the employer to direct its employees, necessary to protect the core purposes of the employer's enterprise, or necessary to ensure the integrity of government. City of Springfield (Office of Public Utilities), 9 PERI ¶ 2024 (citing, Commonwealth of Pennsylvania, 13 PPER ¶ 13097 (PA PPER 1982), aff'd 84 Pa Comw. 458, 479 A.2d 683, 15 PPER ¶ 15157 (1984) (requiring employees to make financial disclosures to enforce conflict of interest rules)). As discussed below, the Respondent demonstrated that the CR Matrix is a tool that is essential to achieving these goals.

First, the CR Matrix is necessary for the employer to direct its employees because it helps improve a disciplinary system that the DOJ labeled "ineffective." The CR Matrix helps deter misconduct by providing employees with a list of rules coupled with maximum and minimum penalties that the Respondent will impose for their violation. Furthermore, the CR Matrix conveys to employees a new, more rigid approach to discipline that stands in stark contrast to the informal approach, under which employees frequently escaped accountability. Officers therefore know the consequences of their actions with a greater degree of certainty and can expect that the Respondent will apply them.

Second, the CR Matrix is necessary to protect the core purpose of the employer's enterprise, to enforce the law in a fair and impartial manner. Courts have acknowledged that "a policy of condoning abuse may embolden a municipal employee and facilitate further abusive acts." Sassak v. City of Park Ridge, 431 F. Supp. 2d 810, 816, 2006 WL 560579 (N.D. Ill. 2006) (for this reason, an employer's failure to discipline will support a finding of municipal liability). Apart from creating liability for the Respondent, such abuse is antithetical to effective policing. The Respondent's implicit toleration of police abuse and rule violations, referenced in the DOJ's report, undermines the Respondent's stated goal "to protect the rights of all persons within the City

to be free from criminal attack, to be secure in their possessions[,] and to live in peace." See Rules and Regulations, Jt. Exh. 3., p 2.

Here, the CR Matrix represents one step in a broader process that the Respondent has undertaken to eliminate arbitrary adjustment of penalties by members of upper management and, in turn, to more effectively deter officers from abusing their police authority. It newly requires investigators to provide written justification when deviating from presumptive penalty ranges. In also newly requires upper management to provide a written account of "exceptional and unique circumstances" if they wish to bypass the penalty ranges altogether.

Third, the CR Matrix also furthers the Respondent's goals of maintaining the integrity of government. The Respondent's failure to enforce its rules and curtail abuse undermines public trust. The CR Matrix represents the Respondent's attempt to restore that trust by disciplining officers more uniformly and mandating that investigators recommend separation for particularly egregious offenses, so that the Respondent may more easily remove officers who abuse their authority.

While the above-referenced analysis sufficiently demonstrates that the CR Matrix a matter of inherent managerial authority, not all the Respondent's arguments in support of this conclusion have merit. For example, the Respondent contends that the CR Matrix is also a matter of inherent managerial authority because the collective bargaining agreement's management rights clause gives the Respondent authority to discipline employees. However, that clause does not specify that the Respondent may unilaterally determine the method by which it selects a penalty, nor does it provide that the Respondent may unilaterally determine that separation is the presumptively appropriate penalty for certain offenses. See infra, RDO Section 4.a. Waiver; City of Chicago, 31 PERI ¶ 3 (IL LRB-LP 2014) (management rights clause that allowed employer to discipline employees for just cause did not render employer's disciplinary use of footage from hidden cameras a matter of inherent managerial authority). Likewise, the Respondent contends that the CR Matrix is a matter of inherent managerial authority because the Municipal Code of the City of Chicago (Code) grants the Superintendent authority to discipline, discharge, and suspend Department employees. See Chicago Municipal Code § 2-84-040 and 2-84-050. However, the

Code similarly fails to specify the manner in which the Superintendent determines the level of discipline or the circumstances in which it is appropriate escalate discipline for a first offense.[21]

In sum, the CR Matrix is also a matter of inherent managerial authority.

3. Burdens of Bargaining Versus Benefits of Bargaining to the Bargaining Process

The benefits of bargaining over the CR Matrix and Guidelines outweigh the burdens that bargaining imposes on the Respondent's inherent managerial authority.

As a general matter, the balance favors bargaining where the issues are amenable to resolution through the negotiating process, i.e., where the union is capable of offering proposals that are an adequate response to the employer's concerns. Chief Judge of the Circuit Court of Cook County, 31 PERI 114 (IL LRB-SP 2014); Cnty. of St. Clair and the Sheriff of St. Clair Cnty., 28 PERI ¶18 (IL LRB-SP 2011), aff'd by unpub. ord., 2012 IL App (5th) 110317-U (union need not present evidence of its actual proposals). For example, there are significant benefits to bargaining where the employer's decision is economically motivated because the union can provide helpful suggestions to reduce labor costs. Id. at ¶45; Chicago Park Dist. v. Ill. Labor Rel. Bd., 354 Ill. App. 3d at 603; Chief Judge of the Circuit Court of Cook County, 31 PERI 114; Vill. of Ford Heights, 26 PERI ¶145 (IL LRB-SP 2010); Vill. of Bensenville, 19 PERI ¶119; City of Peoria, 3 PERI ¶2025; State of Ill. (Dep't of Cent. Mgmt. Servs.), 1 PERI ¶2016 (IL SLRB 1985). Similarly, Union members' significant interest in the matter at stake also weighs in favor of finding that the issues are amenable to negotiation. Int'l Bhd. of Teamsters, Local 700, 2017 IL App (1st) 152993, ¶ 39; Cnty. of Cook, 2017 IL App (1st) 153015, ¶ 60; Town of Cicero, 338 Ill. App. 3d 364, 371 (1st Dist. 2003). Employees' unique perspective can inform the employer's decision, and employees' stake in a subject can motivate them to produce workable solutions that further the employer's own interests. Troopers Lodge #41, Fraternal Order of Police, 34 PERI ¶ 18 (IL LRB-SP 2017).

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[21] Even if the Board determines that the Municipal Code demonstrates that the CR Matrix is a matter of inherent managerial authority, it would be contrary to both the language of the Act and the Illinois Supreme Court's decision in Decatur to find that the Respondent has no obligation to bargain over the CR Matrix because of the Municipal Code's broad grant of authority to the Superintendent. It is well-established that the "mere existence of a statute on a subject does not, without more, remove that subject from the scope of the bargaining," and that parties must negotiate over matters that "supplement, implement, or relate to the effect" of laws that pertain to a matter that affects employees' terms and conditions of employment, such as the CR Matrix in this case. City of Decatur, 122 Ill. 2d at 364; 5 ILCS 315/7.

In contrast, the balance favors unilateral decision-making where the employer's decision concerns policy matters that are intimately connected to its governmental mission or where bargaining would diminish its ability to effectively perform the services it is obligated to provide. Chief Judge of the Circuit Court of Cook County, 31 PERI 114; Vill. of Franklin Park, 8 PERI ¶2039 ("the scope of bargaining in the public sector must be determined with regard to the employer's statutory mission and the nature of the public service it provides"); State of Ill. Dep'ts of Cent. Mgmt. Servs. and Corrections, 5 PERI ¶2001 (IL SLRB 1988), affirmed, 190 Ill. App. 3d 259 (1st Dist. 1989). Consequently, the benefits of bargaining are minimal when the employer's decision effects a fundamental change in the manner in which the employer conducts its business. City of Evanston, 29 PERI ¶162 (IL LRB-SP 2013); State of Ill. Dep'ts of Cent. Mgmt. Servs. and Corrections, 5 PERI ¶2001, affirmed, 190 Ill. App. 3d 259 (1st Dist. 1989).

In this case, the benefits of bargaining are significant. Employees have a strong interest in the CR Matrix because it impacts employee discipline, a matter most central to the employer-employee relationship, and indeed to employees' continued employment. The Union is in a unique position to help devise penalties that appropriately punish or deter misconduct, and it can offer novel approaches to prevent the recurrence of certain types of misconduct. Chicago Transit Authority, 22 PERI ¶ 120. The Union has specific knowledge of the challenges officers face on the job and the ways in which unaddressed stress can impact an officer's judgment and contribute to officer misconduct. As the DOJ observed, stress on the job can "play out in harmful ways for CPD officers."[22] Occupational pressures, such as increased levels of gun violence in the community, can lead to substance abuse and poor judgment in use of force. While the CR Matrix seeks to eliminate such misconduct by permanently removing the offending officer from service, the Union can offer suggestions on how to rehabilitate officers, maintain a more resilient work force, and achieve the Respondent's primary goal: to preserve the integrity of the Department. Notably, such suggestions may have the added benefit of retaining officers with valuable experience, whose problems may be amenable to resolution, while avoiding costs of training replacement officers who may succumb more easily to the new stresses of their work. Int'l Bhd. of Teamsters, Local 700, 2017 IL App (1st) 152993, ¶ 39 (employees had an interest in avoiding discipline from enforcement of an order that prohibited association with members of a known criminal organization); Troopers Lodge #41, Fraternal Order of Police, 34 PERI ¶ 18 (IL LRB-SP

[22] See Joint Exh. 22, p 118.

2017) (finding certain aspects of health insurance to be mandatory subjects of bargaining, despite compelling evidence that provision of health insurance impacted State's budget and obligation to provide public services); County of Cook (Juvenile Temporary Detention Center), 14 PERI ¶ 3008 (union had a substantial interest in bargaining over drug testing program that could result in disciplinary action and the loss of employment); Central City School Dist., 133, 9 PERI ¶ 1051 (IELRB 1993).

In addition, the Union has a strong interest in advancing one of the goals of the CR Matrix, ensuring that the Respondent issues discipline consistently across districts and police units. A system that guards against favoritism not only improves overall morale but also ensures that the publication of the CR Matrix will deter misconduct on a broad scale, and not just against those officers who lack protection at higher levels of the administration. However, the DOJ commented that the Respondent's approach left much to be desired because it still "leaves the door open for less well-disposed individual to favor or disfavor officers according to whim" by allowing deviations from the matrix in "unique and exceptional circumstances." The Union could offer helpful suggestions on how to narrow or define that language in a manner that would foreclose manipulation by members of upper management who may value personal relationships over the Department's interests when selecting a penalty. These shared objectives further illustrate that the benefits of bargaining outweigh any burden that bargaining imposes on the Respondent's inherent managerial authority. County of Cook, 2017 IL App (1st) 153015, ¶ 60 (finding benefits outweighed the burdens where bargaining could result in a solution that satisfied both parties).

The Respondent's own acknowledgement of the benefit derived from Union input on the CR Matrix further demonstrates that the balance favors bargaining. The benefits to the decision-making process derived from bargaining are even greater than the benefits of input because a union will devote more time to formulating proposals when the employer is obligated to consider them. Troopers Lodge #41, Fraternal Order of Police, 34 PERI ¶ 18; Central City School Dist. 133, 9 PERI ¶ 1051. Here, Chief Labor Negotiator for the City, Martinico, testified that unions provide valuable input and often make recommendations that improve the Respondent's policies. For this reason, the Respondent invited unions to provide feedback on the CR Matrix and even modified the CR Matrix in response to their suggestions. Accordingly, the benefits that the Respondent already reaped from solicitation of Union input will be magnified by mandatory bargaining.

By contrast, the burdens that bargaining imposes on the Respondent's inherent managerial authority are minimal. The Respondent contends that it must retain authority to unilaterally create the penalty ranges for each violation to effectively deter and punish misconduct. However, the deterrent effect is accomplished in large part by the publication of the penalty (or penalty ranges) that attach to the various rule violations, and not by the Respondent's unilateral designation of the appropriate penalty range, at issue in this case. The Respondent could accomplish a comparable deterrent effect by publishing the penalties (and penalty ranges) after negotiating them with the Union.

The Respondent contends that bargaining is time consuming and that it would add another contentious adversarial step to the disciplinary process, but such generalized burdens do not constitute a burden on the employer's inherent managerial authority sufficient to justify unilateral action. Am. Fed'n of State County & Mun. Employees v. State Labor Relations Bd., 274 Ill. App. 3d at 334 (possibility of increased tensions between parties was not unique to the disputed issue and did not constitute a burden on employer's inherent managerial authority); Troopers Lodge #41, Fraternal Order of Police, 34 PERI ¶ 18 (rejecting generalized burdens in finding that some aspects of health insurance were mandatory subjects of bargaining). Moreover, "meaningful negotiations do not necessarily have to be long and drawn out." Central City, 149 Ill. 2d at 523.

More importantly, there is no exigency that requires immediate action by the Respondent to adopt the CR Matrix without first bargaining with the Union. The circumstances that precipitated the Respondent's development of the CR Matrix have existed for many years. Indeed, the Respondent first identified the need for a CR Matrix in August 2008, over eight years before the Respondent implemented it on February 3, 2017. Even after the Respondent developed a workable draft of the CR Matrix in February 2016, the Respondent refined it over a year's time, incorporating suggestions for its improvement made by the Department of Justice and the PBPA, the union that represents the Department's sergeants and lieutenants. Notably, the DOJ's scrutiny of the Respondent's disciplinary practices is also not a new development since it began approximately a year before the Respondent implemented the CR Matrix. Cnty. of Lake, 28 PERI ¶ 67 (IL LRB-SP 2011) (reorganization plan was not matter of urgency where consultant had suggested the plan four years before the employer implemented it); County of Cook (Juvenile Temporary Detention Center), 14 PERI ¶ 3008 (finding drug testing policy to be mandatory subject

of bargaining where employer did not identify a need to for speed or secrecy that might justify unilateral action).

The Respondent further suggests that bargaining over the CR Matrix would unfairly allow the Union to challenge disciplinary actions twice, once before the Department selects a penalty and once after the Department's chain of command approves the penalty selection. However, this is an inaccurate characterization that conflates the Union's request to bargain over a broad process (at issue here) and the Union's objections to the application of discipline under a narrow set of circumstances (at issue in grievance arbitration). The Union does not seek to bargain over the penalty in each case where the Respondent has sustained a violation against an officer. Rather, the Union simply wishes to bargain over the process by which the Respondent selects that penalty and the penalty ranges that the Respondent has newly designated as appropriate for the identified rule violations. Although the Union has contractually reserved the right to challenge the discipline imposed by the Respondent in a particular case, the Union in such cases focuses on the discrete facts raised by one employee's alleged infraction, and not the process of penalty selection applied to all employees, at issue here.

Furthermore, the Respondent has not offered evidence that bargaining would hamper its ability to provide effective policing. The Respondent suggests that if the Union could dictate the penalties appropriate for each category of violation then, in effect, the Respondent could not adequately punish misconduct, but "bargaining does not require such an extreme result." Cnty. of Cook, 2017 IL App (1st) 153015, ¶ 59. Indeed, the bargaining obligation "does not compel either party to agree to a proposal or require the making of a concession." Id.; 5 ILCS 315/7. The Respondent's arguments to this effect are further undercut by the DOJ's findings that the Respondent's unilateral attempts at creating a more effective disciplinary system have fallen short. While bargaining does not guarantee a better result, it will provide the Respondent with the opportunity to constructively resolve problems that might arise from the CR Matrix's implementation, which the Respondent may not have recognized.

Contrary to the Respondent's contention, the formulation of the CR Matrix is not the type of policy decision that is outside the scope of mandatory bargaining. The Respondent's ability to effectively deter and penalize misconduct is necessary to its ability to provide effective policing services and to maintain legitimacy in the eyes of the public. Nevertheless, the process by which the Respondent selects a penalty, determines the extent to which mitigating circumstances may be

considered, and decides when to eschew progressive discipline are also matters at the heart of the employment relationship because they implicate job security. Int'l Bhd. of Teamsters, Local 700, 2017 IL App (1st) 152993, ¶ 37 & 39 (benefits of bargaining over gang order, which subjected employees to potential discipline, outweighed burdens even though gang order related to preventing crime and maintaining safety, which was the respondent's core function); Chicago Transit Authority, 33 PERI ¶ 61 (IL LRB-LP 2016) (use of footage to justify discipline of employees was mandatory subject of bargaining even though ALJ acknowledged such use furthered the integrity of the Respondent as a governmental entity and was also a matter of inherent managerial authority); cf. Am. Fed. of State, Cnty., and Mun. Empl., AFL-CIO, 190 Ill. App. 3d at 269 (drug testing policy was not a mandatory subject of bargaining, but Board correctly ordered further bargaining on disciplinary impact); cf. City of Jersey City v. Jersey City Police Officers Benev. Ass'n, 154 N.J. 555 (1998) (action taken to redeploy police officers and fill their vacated position with civilians in an effort to increase officers in operational positions was a policy decision and a matter of inherent managerial authority).

In sum, the CR Matrix is a mandatory subject of bargaining because the benefits of bargaining over the CR Matrix outweigh any burden that bargaining imposes on the Respondent's inherent managerial authority.

4. Waiver

The Union did not contractually waive its right to bargain over the Respondent's decision to institute the CR Matrix. It also did not waive its right to bargain over the CR Matrix through past practice.

A Union's waiver of its right to bargain must be clear, unequivocal and unmistakable. Am. Fed'n of State. Cnty. and Mun. Empl. v. Ill. State Labor Rel. Bd., 274 Ill. App. 3d 327, 334 (1st Dist. 1995); Cnty. of Cook v. Illinois Local Labor Rel. Bd., 214 Ill. App. 3d 979 (1st Dist. 1991); Chicago Park Dist., 18 PERI ¶ 3036 (IL LLRB 2002). When a party claims waiver by contract, the language supporting the claim of waiver must be specific because a waiver is never presumed. AFSCME, 274 Ill. App. 3d at 334. A party may also waive the right to bargain through past practice. However, the courts have held that the past practice exception to the obligation to bargain must be "narrowly construed." Bd. of Educ. of Sesser-Valier Cmty. Unit Sch. Dist. No. 196 v. Illinois Educ. Labor Relations Bd., 250 Ill. App. 3d 878, 882 (4th Dist. 1993); see also City of

Chicago (Chicago Fire Dep't), 12 PERI ¶ 3015 (IL LLRB 1996); Chicago Board of Education and Chicago School Finance Authority, 10 PERI ¶ 1107 (IL ELRB 1994). Similarly, the National Labor Relations Board has held that a right once waived is not lost forever, and a union can request negotiations each time the bargainable event occurs. NLRB v. Miller Brewing Co., 408 F.2d 12, 15 (9th Cir. 1969); see also Bd. of Trustees of Southern Ill. Univ. (Edwardsville), 14 PERI ¶ 1021 (IL ELRB ALJ 1997). It is the respondent's burden to show that a waiver exists. City of Chicago Police Dep't, 21 PERI ¶ 83 (IL LRB-LP 2005).

a. Alleged Contractual Waiver

Here, the Union did not contractually waive the right to bargain over the Respondent's decision to implement the CR Matrix because the contract does not permit the Respondent to unilaterally change its disciplinary procedures.

The Respondent's authority to discipline employees for just cause, pursuant to the management rights clause, does not establish the Respondent's authority to change its disciplinary procedures. It simply authorizes the Respondent to discipline employees using its existing practices. Nothing in that provision (Article 4, M) specifies that the Respondent may unilaterally change its penalty selection process, establish new penalties and penalty ranges for specific rule violations, change its approach to progressive discipline, escalate penalties for certain violations, or limit consideration of mitigating factors for some violations, as it has done through the CR Matrix and CR Guidelines. Graymont Pa, Inc., 364 NLRB No. 37 at *2-3 (management rights clause that conferred employer the exclusive right "to discipline and discharge for just cause" did not waive union's right to bargain changes to existing work rules, absenteeism policy, and progressive discipline schedule).

Likewise, the contract's grievance arbitration provisions (Article 9) and employment security/just cause provision (Section 8.1) do not evidence the Union's intent to waive the right to bargain over changes to the disciplinary procedure and penalty selection process. They certainly do not demonstrate the Union's intent to allow the Respondent to identify types of conduct that justify a zero-tolerance approach or to limit investigators' consideration of mitigating circumstances in such cases. Windstream Corp., 355 NLRB 406 (2010), incorporating 352 NLRB at 50 ("If anything, such [just cause] language shows the union's interest in the fairness of the Respondent's application of discipline").

In addition, the Respondent's reserved authority to "alter policies, procedures, or other rules and regulations," set forth in the management rights clause (Article 4, N), is too vague to waive the Union's statutory right to bargain over the changed disciplinary procedures at issue in this case. In this respect, the Respondent's management rights clause is strikingly similar to the management rights clause at issue in Graymont Pa, Inc., which the NLRB found did not waive the union's right to bargain over changes to work rules and the progressive discipline schedule. Graymont Pa, Inc., 364 NLRB No. 37 at *3-4. There, the NLRB affirmed the ALJ's reasoning that the employer's authority to "adopt and enforce rules and regulations and policies and procedures," did not constitute a clear an unmistakable waiver of the Union's right to bargain over changes to disciplinary rules and procedures. Id. The NLRB reasoned that the contract did not specify the that the Respondent had authority to adopt rules and policies *for discipline*. Id. Similarly, here, the management rights clause makes no reference to the Respondent's specific authority to establish new disciplinary procedures, and that silence precludes a finding that the Union waived the right to bargain the disciplinary procedures implemented by the CR Matrix and Guidelines in this case. Compare Graymont Pa, Inc., 364 NLRB No. 37 at *4 and United Technologies Corp., 287 NLRB 198, 198 (1987) (union waived the right to bargain changes to progressive discipline where the management rights clause gave employer the "*right to make and apply rules and regulations for* production, *discipline*, efficiency, and safety") (emphasis added).

Next, the Superintendent's authority to suspend officers, set forth in Section 8.8 of the contract, likewise fails to demonstrate that the Union waived the right to bargain over the Respondent's changes to its disciplinary procedures, effectuated by the CR Matrix and Guidelines. The Superintendent's stated authority does not mention any authority to establish new disciplinary procedures concerning penalty selection, nor does it specify any authority to assess a penalty without regard to the full spectrum of mitigating circumstances. Windstream Corp., 355 NLRB 406 (2010), incorporating 352 NLRB at 50 (noting that zero-tolerance policy, which eliminated consideration of mitigating circumstances, also modified the just cause provision contained in the contract).

Furthermore, the generally-worded zipper clause, at issue in this case,[23] does not waive the Union's right to bargain over the disciplinary changes effectuated by the CR Matrix and

[23] The zipper clause states the following in relevant part: "Except as may be stated in this Agreement, each party voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to

Guidelines. "A zipper clause must meet the standard of any other form of alleged waiver: there must be a clear and unequivocal relinquishment of the right to bargain." Vill. of Bensenville, 19 PERI ¶ 119 (IL LRB-SP 2003). Accordingly, where an employer relies on a generally-worded zipper clause as its authority to make a unilateral change, it must additionally point to express contract language that grants it authority to make the change. City of Chicago (Dep't of Police), 21 PERI ¶ 83. Alternatively, it must present "evidence that the particular matter at issue was fully discussed or consciously explored during bargaining, and that the union knowingly yielded and unmistakably waived its interest in that matter." Vill. of Bensenville, 19 PERI ¶ 119; City of Chicago (Dep't of Police), 21 PERI ¶ 83 aff'd by unpub. order, Docket No.1-05-1713, 22 PERI ¶ 82 (Ill. App. Ct., 1st Dist. 2006); see also City of Chicago, 18 PERI ¶ 3025 (IL LRB-LP 2002); City of Chicago, 4 PERI ¶ 3025 (IL LLRB 1988), aff'd, Water Pipe Extension, Bureau of Eng'g, Laborers Local 1092 v. City of Chicago, 195 Ill. App. 3d 50 (1st Dist. 1990).

As set forth in the analysis above, the cited contract provisions include no language that grants the Respondent the authority to make the changes effectuated by the CR Matrix and Guidelines. They do not grant the Respondent the authority to unilaterally change disciplinary procedures or establish penalty ranges that never existed before for specific rule violations. They also do not permit the Respondent to create a new system that requires investigators to recommend separation as the penalty for certain complaint category violations, and makes it more difficult for reviewing members of management to change investigators' recommendations or deviate from the CR Matrix's framework.

In addition, there is no evidence that the parties fully discussed or consciously explored the Respondent's claimed right to make such midterm changes to the disciplinary procedure. Although there was some mention during bargaining that the Inspector General's office would become more involved in the disciplinary process, the parties did not discuss the Respondent's alleged authority to establish fixed disciplinary penalties or ranges for particular complaint category rule violations. Nor was there any mention of the Respondent's authority to change the method it then used to select disciplinary penalties for complaint category rule violations. Indeed, the Respondent had not formulated a working version of the CR Matrix until two years after the

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bargain collectively with respect to any subject or matter referred to, or covered in this Agreement or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated and signed this agreement."

parties executed their most recent contract. The version of the CR Matrix which then existed had no penalty ranges, and there is no indication that the Union knew of its existence. Accordingly, the zipper clause does not waive the Union's right to bargain over the CR Matrix and Guidelines.

This conclusion is consistent with the case law cited by the Respondent on brief, in which the Board and the court did find waiver. In those cases, the finding of wavier was not based solely on a generally-worded zipper clause, but also on other contract language that addressed the specific matter at issue. Water Pipe Extension, Bureau of Eng'g, Laborers Local 1092 v. City of Chicago, 195 Ill. App. 3d 50 (1st Dist. 1990) (broad zipper clause, combined with contract provision that set forth the parties' agreement regarding the union's right to information related to filling of vacancies, waived union's right to receive information related to the filling of vacancies that was not referenced in contract); City of Chicago, 18 PERI ¶ 3025 (zipper clause waived union's right to bargain over ordinance that mandated retirement at age 63 where another clause stated the contract would not "preclude mandatory retirement...upon or after...age 63").[24] Here, by contrast, there is no language in the contract that addresses the penalty selection process for complaint register rule violations. There is also no language in the contract that specifies the appropriate penalties or ranges that attach to each and every rule violation found under the complaint register investigation process.

Finally, the contract language that addresses summary punishment procedures further supports the finding that the Union did not waive the right to bargain over the CR Matrix and Guidelines. When the Department secured the right to unilaterally establish guidelines and penalties concerning the application of summary punishment, it did so by express contract language. That language unambiguously referenced the Respondent's obligation to establish both reasonable summary punishment guidelines and the penalties for violations subject to summary punishment: "the Department shall promulgate, maintain and publicize reasonable guidelines which will specify those acts...which will subject an Officer to Summary Punishment...and the penalties for each such violation." See CBA Section 7.1(B). The fact that the contract contains no such specific language regarding the Respondent's authority to establish guidelines and

[24] In City of Chicago, supra, the union also waived the right to bargain the effects of the mandatory retirement policy where the zipper clause waived negotiations over matters "referred to" in the contract and where the contract referenced retiree health insurance. City of Chicago, 18 PERI ¶ 3025.

penalties for Complaint Register rule violations demonstrates that the Union did not contractually waive the right to bargain the CR Matrix and Guidelines.

b. Alleged Waiver by Conduct

Similarly, the Union did not waive the right to bargain over the CR Matrix by failing to demand bargaining over the Respondent's implementation of the SPAR Matrix, in 2013. "Only the clearest evidence of a waiver of any right to bargain about a particular matter on which a contract is otherwise silent will be said to relieve the employer of its duty to bargain." Vill. of Lisle, 23 PERI ¶ 111 (IL LRB-SP 2007).

Here, the Union did not fail to demand bargaining over an earlier, similar change because the two matrices are distinguishable, both in substance and as reflected by the parties' contractual understanding. Substantively, the CR Matrix addresses the appropriate penalties for more serious instances of misconduct than does the SPAR Matrix, and it also identifies higher penalties overall, up to and including separation. The parties' contract, then in effect, likewise illustrates the parties' understanding that the SPAR process was separate from other disciplinary processes. It authorized the Respondent to develop guidelines and penalties for Summary Punishment, but remained silent as to the penalty selection process for more severe misconduct. Chicago Board of Education and Chicago School Finance Auth., 10 PERI ¶ 1107 (even if union had waived the right to bargain previous layoffs through inaction, there was no indication that union waived right to bargain current layoffs, where they were more extensive than the earlier ones).

Even if the Board determines that the SPAR Matrix is comparable to the CR Matrix, the Union's failure to protest that earlier change does not demonstrate a waiver of the right to bargain the instant change. Both public and private sector labor boards have rejected claims that a union's failure to protest such earlier unilateral action would act as a waiver of its right to bargain similar changes in the future. Bd. of Educ. of Sesser-Valier Cmty. Unit Sch. Dist. No. 196, 250 Ill. App. at 882 (4th Dist. 1993); see also City of Chicago (Chicago Fire Dep't), 12 PERI ¶ 3015 (rejecting respondent's claim that union waived the right to requested information by past practice where city had never provided the union with that information before); Chicago Board of Education and Chicago School Finance Authority, 10 PERI ¶ 1107; Miller Brewing Co., 408 F.2d at 15; Bd. of Trustees of Southern Ill. Univ. (Edwardsville), 14 PERI ¶ 1021 (employer's past practice of setting parking fees did not demonstrate that union waived the right to bargain those fees).

In sum, the Union did not waive the right to bargain over the CR Matrix and the CR Guidelines.

5. Existence of Bargaining and Impact of Union's Conduct

The Respondent did not bargain with the Union over the CR Matrix and the CR Matrix Guidelines. In addition, the Union was privileged to refuse bargaining and insist on the status quo.

An employer cannot satisfy its statutory duty to bargain by expressing a willingness to discuss a bargainable subject while maintaining that it has no duty to bargain. City of Highwood, 17 PERI ¶ 2021 (IL LRB-SP 2001); San Diego Cabinets, 183 NLRB 1014, 1020 (1970); Mi Pueblo Foods, 360 NLRB No. 116, slip op. at 10, 17 (2014). Yet, that is precisely what the Respondent did in this case when it promised to "listen attentively" to the Union's "comments or observations" on the CR Matrix and Guidelines, but affirmed that the "Matrix is not subject to a bargaining obligation." City of Highwood, 17 PERI ¶ 2021 (respondent bargained while asserting it was not under the jurisdiction of the Act and that there was no statutory obligation to abide by the agreement reached); San Diego Cabinets, 183 NLRB at 1020 (rejecting employer's contention that because it informed union of its willingness to meet and discuss matters it had not refused to bargain; where employer consistently maintained that it had no duty to bargain: "its professed willingness to discuss this unlawful position does not excuse the violation"), enf'd, 453 F.2d 215 (9th Cir. 1971); Mi Pueblo Foods, 360 NLRB No. 116, slip op. at 10, 17 (2014) (effects bargaining violation for employer to state that while it had no duty to bargain it was willing to "discuss" a process for implementing layoffs).

Contrary to the Respondent's contention, the Union's own refusal to participate in these discussions has no bearing on the outcome of this case. As noted above, these meetings were not in fact good faith bargaining sessions, but merely an opportunity for the union to provide comment that the Respondent could take or leave.

Even if these meetings were bargaining sessions, the Union's refusal to participate was privileged by the parties' zipper clause. The Union lawfully relied on that clause as a shield against midterm, unilateral changes to employees' terms and conditions of employment, and any attempt by the Respondent to bargain them midterm. Vill. of Bensenville, 19 PERI ¶ 119 ("a zipper clause serves as a 'shield' which a party may use against the other party's request for midterm bargaining, but not as a 'sword' to accomplish unilateral changes in terms and conditions of employment").

Thus, the Respondent violated Sections 10(a)(4) and (1) of the Act when it unilaterally implemented the CR Matrix and CR Guidelines.

V. CONCLUSIONS OF LAW

The Respondent violated Sections 10(a)(4) and (1) of the Act when it unilaterally implemented the CR Matrix and CR Guidelines.

VI. RECOMMENDED ORDER

IT IS HEREBY ORDERED that the Respondent, its officers and agents, shall:

1) Cease and desist from:
    a. Failing and refusing to bargain collectively in good faith with the Charging Party, Fraternal Order of Police, Lodge #7, concerning the decision to implement the CR Matrix and Guidelines.
    b. In any like or related manner, interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them in the Act.
2) Take the following affirmative action necessary to effectuate the policies of the Act:
    a. On request, bargain collectively in good faith with the Charging Party, Fraternal Order of Police, Lodge #7, concerning the decision to implement the CR Matrix and Guidelines.
    b. Restore the status quo ante by rescinding the CR Matrix and Guidelines and rescinding any disciplinary action that the Respondent imposed using the CR Matrix and Guidelines. Reassess the level of discipline to be imposed using the informal penalty selection/review process in existence before the Respondent implemented the CR Matrix and Guidelines, without reference to the CR Matrix and Guidelines.
    c. Make unit members whole for any losses they may have suffered as a result of the Respondent's decision to use the CR Matrix and Guidelines to select a disciplinary penalty, with interest at seven percent per annum.[25]

[25] West Northfield School Dist. No. 31, 10 PERI ¶ 1056 (IL ELRB 1994) (reversing ALJ's decision not to award a make whole remedy for a unilateral change, finding that whether any employee suffered actual loss was a matter for the compliance hearing).

d. Post, at all places where notices to employees are normally posted, copies of the Notice attached to this document. Copies of this Notice shall be posted, after being duly signed, in conspicuous places, and be maintained for a period of 60 consecutive days. The Respondent will take reasonable efforts to ensure that the notices are not altered, defaced or covered by any other material.

e. Notify the Board in writing, within 20 days from the date of this Decision, of the steps the Respondent has taken to comply with this order.

VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 15 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within seven days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions and cross responses must be filed with the Board's General Counsel, at 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, or to the Board's designated email address for electronic filings, at ILRB.Filing@Illinois.gov. All filing must be served on all other parties. Exceptions, responses, cross-exceptions and cross-responses will not be accepted at the Board's Springfield office. The exceptions and/or cross-exceptions sent to the Board must contain a statement of listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and/or cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 30-day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois this 8th day of November, 2017

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL

/S/ *Anna Hamburg-Gal*

Anna Hamburg-Gal
Administrative Law Judge

NOTICE TO EMPLOYEES

FROM THE

ILLINOIS LABOR RELATIONS BOARD

Case No. L-CA-17-034

The Illinois Labor Relations Board, Local Panel, has found that the City of Chicago (Department of Police) has violated the Illinois Public Labor Relations Act and has ordered us to post this Notice. We hereby notify you that the Illinois Public Labor Relations Act (Act) gives you, as an employee, these rights:

- To engage in self-organization
- To form, join or assist unions
- To bargain collectively through a representative of your own choosing
- To act together with other employees to bargain collectively or for other mutual aid and protection
- To refrain from these activities

Accordingly, we assure you that:

WE WILL cease and desist from failing and refusing to bargain collectively in good faith with the Charging Party, Fraternal Order of Police, Lodge #7, concerning our decision to create the CR Matrix and Guidelines.

WE WILL restore the status quo ante by rescinding the CR Matrix and Guidelines and rescinding any disciplinary action that we imposed using the CR Matrix and Guidelines. We will reassess the level of discipline to be imposed using the informal penalty selection/review process in existence before we implemented the CR Matrix and Guidelines, without reference to the CR Matrix and Guidelines.

WE WILL make unit members whole for any losses they may have suffered as a result of our decision to use the CR Matrix and Guidelines to select a disciplinary penalty, with interest at seven percent per annum.

DATE _____

_____
City of Chicago (Department of Police)
(Employer)

ILLINOIS LABOR RELATIONS BOARD

One Natural Resources Way, First Floor
Springfield, Illinois 62702
(217) 785-3155

160 North LaSalle Street, Suite S-400
Chicago, Illinois 60601-3103
(312) 793-6400

THIS IS AN OFFICIAL GOVERNMENT NOTICE

AND MUST NOT BE DEFACED.